1989

State of Utah v. Gilberto Gonzales : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
GILBERTO GONZALES,	:	Case No. 890202-CA Priority #2
Defendant/Appellant.		

BRIEF OF APPELLANT

Appeal from the defendant's conviction and sentencing on the charge of Driving Under the Influence of Alcohol, a class B misdemeanor, in the Third Circuit Court in and for Salt Lake County, State of Utah, Murray City Department, the Honorable Maurice D. Jones presiding.

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STATEMENT OF THE CASE

The defendant, GILBERTO GONZALES, was arrested on August 4, 1988, and charged with Driving Under the Influence of Alcohol, a class B misdemeanor. See §41-6-44, Utah Code Ann. (1988). On August 17, 1988, the case (Justice Court No. 2-1984-98A) was filed by the Salt Lake County Attorney in the Second Precinct Justice Court for Salt Lake County. On October 18, 1988, a hearing was held in that court on the defendant's Motion to Instruct the jury on "defense of justification." See §76-2-401, Utah Code Ann. (1978). Both parties subsequently submitted memoranda on the Motion. The Honorable Phyllis J. Scott, presiding Justice of the Peace, denied the defendant's Motion to Instruct.

Based on advice of counsel and the Justice Court's denial of the defendant's pretrial Motion, Mr. Gonzales entered a "conditional" plea of "no contest" to the charge on April 25, 1989. See, e.g., State v. Sery, 758 P.2d 935, 938 (Utah App. 1988)

(Conditional plea of "no contest" was sensible and sound way to preserve suppression issue for appeal after denial of Motion in District Court). The defendant, through counsel, stated in court at that time that the purpose of the "no contest" plea was to appeal the justice court's denial of the defendant's Motion to Instruct. No trial was held in the justice court. W.C. Gwynn, Deputy County Attorney, agreed to the conditional plea in court at that time.

A Notice of Appeal was filed in the justice court on April 28, 1989. The case was transferred to the Third Circuit Court (Cir. Ct. No. 892004016TC), Murray City Department. The defendant timely filed a written Motion to Instruct the jury on defense of justification with a supporting memorandum in the circuit court. Maurice D. Jones, presiding judge, refused to rule on the Motion prior to trial.

On July 14, 1989, the first and only trial in this case was held in the circuit court. After the State and defense had rested, Judge Jones denied the defendant's Motion to Instruct the jury on defense of justification. Judge Jones ruled that there was an insufficient factual basis to support the instruction.

The jury returned a verdict of guilty to the charge of Driving Under the Influence of Alcohol. Judge Jones sentenced the defendant that day to: (1) 60 days in jail, with 57 suspended upon completion of probation, and three suspended for 24 hours of community service; (2) $480 fine to be paid within 60 days; (3) $120 fine surcharge to be paid within 60 days; (4) $100 victim restitution fund assessment to be paid within 60 days; (5) $50

alcohol rehabilitation fee to be paid within 60 days; (6) $150 attorney fee to be paid within 60 days; and (7) six months probation supervised by the Alcohol Counseling and Education Center.

On July 31, 1989, the defendant filed a Notice of Appeal (Ct. App. No. 890202CA). On August 11, 1989, the defendant filed a Motion to Amend the sentence in the Circuit Court. Judge Jones refused to rule on the Motion for lack of jurisdiction.

The defendant applied to the circuit court for a Certificate of Probable Cause to stay the sentence pending appeal. Judge Jones declined to schedule a hearing or issue on Order. There are no written findings of fact nor conclusions of law in this matter and the basis of the circuit court's action is unclear. The defendant then applied to the Court of Appeals for a Certificate of Probable Cause which was issued by the Court on November 20, 1989. See Addendum A.

JURISDICTIONAL STATEMENT AND ARGUMENT

Jurisdiction is conferred upon this Court pursuant to §78-2a-3(2)(d), Utah Code Ann. (1989), whereby a defendant in a criminal case may take an appeal to the Court of Appeals from a final judgment in a circuit court.

ARGUMENT

JURISDICTION IS NOT DENIED UNDER §77-35-26(13)(a), UTAH CODE ANN. (1989), PURSUANT TO THE RULING IN CITY OF MONTICELLO V. CHRISTENSEN, 769 P.2d 853 (Utah App. 1989).

POINT A

MONTICELLO DOES NOT APPLY TO THE FACTS OF THIS CASE

In City of Monticello v. Christensen, 769 P.2d 853 (Utah App. 1989), defendant Christensen was convicted of driving without a valid Utah license after a trial in the justice court. He appealed, and was again convicted of the charge after a trial de novo in the circuit court. In the case at bar, however, Mr. Gonzales never had a trial in the justice court. He entered a conditional plea of "no contest" because his pretrial Motion to Instruct was denied. Thus, Mr. Gonzales, unlike Christensen, has not fully realized his right to appeal via trial de novo because the only issue reconsidered in the circuit court was the pretrial Motion. See Utah Const. art. VIII, §5 (1989); see also §§78-4-7.5 (1989) and 78-5-14 (1987). Dismissal of his case by the Court of Appeals would deny Mr. Gonzales his right to appeal. See Utah Const. art. I, §12.

The rationale of Monticello is that under §77-35-26(13)(a) "an appeal from the justice court affords defendant a trial 'anew' in the circuit court . . ." 769 P.2d at 854. This rationale does not apply to the facts in the case at bar. For this reason Monticello is distinguishable and should not deny the Court of Appeals jurisdiction to review the case at bar.

POINT B

SECTION 77-35-26(13)(a) IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE.

Justice courts and circuit courts in Utah have concurrent original jurisdiction over class B misdemeanors, including DUI charges filed under Article 5 of Chapter 6 of Title 41 of the Utah Code. See §§78-4-5(1)(a)(1989), 78-4-5(1)(1987), and 78-5-4(1987), Utah Code Ann. Thus, the charge against Mr. Gonzales could have been filed originally in the Third Circuit Court rather than the Second Precinct Justice Court. Had the case been filed in circuit court, Mr. Gonzales would be entitled under Utah law to appeal judgments rendered there to the Court of Appeals. See Utah Const. art. I, §12, and §78-4-11, Utah Code Ann. (1987). Mr. Gonzales would be denied review by the Court of Appeals under §77-35-26(13)(a), Utah Code Ann. (1989), solely because the case was filed originally in a justice court.

1. AS APPLIED, §77-35-26(13)(a) DENIES MR. GONZALES HIS CONSTITUTIONAL RIGHT TO APPEAL. Article I, §12 of the Utah Constitution guarantees that "In criminal prosecutions the accused shall have . . . the right to appeal in all cases." On the facts of this case §77-35-26(13)(a) would deny Mr. Gonzales his right to appeal the judgments of the trial court, that is, the circuit court, because the only judgment from the justice court subjected to reconsideration in the circuit court was the pretrial Motion to Instruct the jury.

2. AS APPLIED, §77-35-26(13)(a) VIOLATES EQUAL PROTECTION OF LAWS. Article I, §24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation." The Fourteenth Amendment to the United States Constitution prohibits any state from enacting laws that deny "any person within its jurisdiction equal protection of the law."

Under Article I, §24 of the Utah Constitution, (1) laws must apply equally to all persons within a class, and (2) statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984). In the case at bar, the relevant class is people charged with class B DUI under §41-6-44, Utah Code Ann. (1988). Members of the class are treated differently under §77-35-26(13)(a) depending on whether the charge is filed in justice court or circuit court. Under the facts of this case, Mr. Gonzales would be denied his right to appeal the judgments of the trial court because his case was filed originally in a justice court. Section 77-35-26(13)(a) fails the Malan test because filing venue is arbitrary and within the unfettered discretion of the prosecuting agencies. Further, it is contrary to public policy by encouraging forum shopping by prosecutors. Assuming the objective of §77-35-26(13)(a) is judicial economy, the Rule again fails Malan as applied to this case because the State's interest in judicial economy is reduced since Mr. Gonzales never had a trial in the

justice court. 693 p.2d at 671. Cf., Monticello, 769 P.2d 853 (Defendant convicted after trial in justice court and again after trial de novo in circuit court).

Although there is no federal constitutional right to appeal, under the Fourteenth Amendment to the United States Constitution an appeal "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Lindsey v. Normet, 405 U.S. 56, 77, 31 L. Ed. 2d 36 (1972). Under the facts of this case, justice court filing venue is arbitrary, and §77-35-26(13)(a) would effectively deny Mr. Gonzales an appeal from the judgments of the trial court, that is, the circuit court. This violates equal protection under the Federal Constitution because §77-35-26(13)(a) would not apply had this case been originally filed in the circuit court.

3. **AS APPLIED, §77-35-26(13)(a) VIOLATES DUE PROCESS OF LAW.** Article I, §7 of the Utah Constitution guarantees that "no person shall be deprived of life, liberty or property, without due process of law." Because §77-35-26(13)(a) would deny Mr. Gonzales his constitutional right to appeal, due process requires that the reasonableness of the statutory scheme outweigh the degree of intrusion upon Mr. Gonzales' rights. Condemarin v. University Hospital, 107 Utah Adv. Rep. 5, 12 (Utah 1989).

Due process of law is also guaranteed by the Fourteenth Amendment, §1, to the Federal Constitution. The United States Supreme Court has stated that due process requires "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a reasonable and substantial relation to the objective sought to be attained." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85, 64 L.Ed. 2d 741, 754 (1980)(quoting Nebbia v. New York, 291 U.S. 502 (1934)).

Assuming that the objective of §77-35-26(13)(a) is judicial economy, the statute violates due process under state and federal standards because it arbitrarily denies Mr. Gonzales the right to appeal his trial while others similarly charged are not so denied. There is no reasonable basis in the statutory scheme for this result; rather, it is within the unfettered discretion of the prosecutors based on where they decide to file the charge. Further, the degree of intrusion upon Mr. Gonzales' rights is substantial because he would be denied his right to appeal the judgments and orders of the trial court, while the State's interest in judicial economy is reduced since he never had a trial in the justice court.

CONCLUSION

The Court of Appeals should not dismiss Mr. Gonzales' appeal for lack of jurisdiction pursuant to the ruling in City of Monticello v. Christensen because that case is distinguished on its facts. Because Mr. Gonzales never had a trial in the justice court,

the underlying rationale of Monticello -- that an appeal from the justice court affords a defendant a trial anew in the circuit court -- does not apply to the facts of Mr. Gonzales' case.

Further, as applied to these facts, dismissal of his appeal would deny Mr. Gonzales his constitutional right to appeal and would violate his rights of due process and equal protection guaranteed by the Utah and United States constitutions. For all of the foregoing reasons the defendant respectfully requests that the Court of Appeals acknowledge jurisdiction to consider his appeal.

STATEMENT OF THE FACTS

On August 4, 1988, at approximately 12:35 a.m. Deputy Fred Baird of the Salt Lake County Sheriff's office observed a brown-colored vehicle traveling westbound in the center turn-lane in the vicinity of 300 East on 3900 South in Salt Lake City. (T: 37-38). Deputy Baird activated the overhead lights on his vehicle west of State Street, and the brown-colored vehicle pulled over at about 250 West and 3900 South. (T: 42). The only person in the car was the driver, Gilberto Gonzales. (T: 43). Deputy Baird approached the vehicle and spoke to Mr. Gonzales through an open window. Mr. Gonzales told him that he was trying to find his son Walter who was very sick. (T: 106). Deputy Baird refused to help find Walter. (T: 7). Deputy Baird noticed an odor of alcohol and slurred speach, and asked Mr. Gonzales to exit the vehicle to perform field sobriety tests. (T: 44). At about this time Deputy Ken Davis arrived at the scene as a back-up officer. (T: 96).

Mr. Gonzales performed a "balance test," a "finger-counting test," and a "hand-clap test." (T: 48-49). According to Deputy Baird, Mr. Gonzales failed these tests. Deputy Davis believed that Mr. Gonzales "was intoxicated beyond the legal point" based on the tests, although he could not remember how Mr. Gonzales performed on the tests. (T: 98; 99-101). Deputy Baird then placed Mr. Gonzales under arrest for driving under the influence of alcohol and transported him to the traffic office to perform a breath test for blood-alcohol content. (T: 50). Mr. Gonzales submitted to the test which produced a result of .20 grams. (T: 63).

Mr. Gonzales is a native of El Salvador. He does not speak English very well. (T: 104). He resides in Kearns, Utah, with his wife and his eighteen-year-old son Walter. (T: 107). Mr. Gonzales works as a housekeeping supervisor at the Hilton Hotel in Salt Lake City from 11:00 p.m. to 7:30 a.m. (T: 103). Mr. Gonzales spent the day of August 3, 1988, at home. He drank some beer at home between the hours of 5:00 p.m. and 11:00 p.m. (T: 108-109). At about 12:00 midnight Mr. Gonzales and his wife became alarmed because their son had not returned home. (T: 104-105). Walter had left the house at about 4:00 p.m., and when the last bus arrived at 12:00 midnight, Walter was not on it. (T: 104). Between 12:00 midnight and 12:15 a.m., Mr. Gonzales left the house and drove his car to a dance club for minors near 2900 South in Salt Lake City, believing that Walter might be there. (T: 117). On prior occasions, Mr. Gonzales had been able to find Walter when he failed to return home. (T: 116-117). Mr. Gonzales then decided to return home, and on the way was arrested by Deputy Baird. (T: 105).

Walter is psychotic. (T: 79). He was hospitalized from September 9 to October 10, 1987, in the intensive treatment unit at the Western Institute of Neuropsychiatry, which is a locked treatment unit for severely disturbed psychotics who can be dangerous to self or others. (T: 84-85). Walter's symptoms included delusions, schizophrenia, auditory hallucinations, thought insertion, ideas of reference, psycho-motor retardation, depression and so on. (T: 80-81). He was then and still is under the continuing care of Sayed Afroz, M.D., who has prescribed various anti-psychotic medications. (T: 81-82). Walter has tried to hurt himself in the past by swallowing things, and has gotten lost on prior occasions. (T: 115; 116). Mr. Gonzales was particularly worried about Walter on August 3, 1988, because he did not feel well and had been hearing voices that day, and Mr. Gonzales believed he had gotten lost or in trouble or might have hurt himself or someone else. (T: 105; 118). Dr. Afroz believed that Walter's condition was potentially dangerous, although he had no specific opinion as to Walter's condition on August 3, 1988, not having seen him that day. (T: 85; 87; 91). At 12:00 midnight the buses had stopped running and nobody else was available to drive Mr. Gonzales to try to find Walter. (T: 106).

SUMMARY OF THE ARGUMENTS

The defendant contends that he was denied a fair trial and that he was illegally sentenced. First, the trial court's denial of the defendant's Motion to Instruct the jury on his defense of justification constitutes reversible error. Second, the trial

court's admission of documents--including the Intoxilyzer Checklist, Affidavit and Receipt--and testimony of Deputy Davis without prior notice to the defendant constitutes reversible error. Third, the sentence imposed by Judge Jones is illegal because it creates conditions more severe than the prior sentence imposed by Justice of the Peace Scott.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF JUSTIFICATION.

Due process guarantees the right of a criminally accused person to present all competent evidence in his defense. See U.S. Const. amend XIV, §1; Utah Const. art. I, §12. Rule 19 of the Utah Rules of Criminal Procedure, and Rule 4.4 of the Rules of Practice in the District Courts and Circuit Courts of the State of Utah allow parties to request instructions to the jury. The Utah Supreme Court has defined the right of a defendant to instruct the jury in a criminal case:

> . . . where the defendant has [1] asserted a defense to justify or excuse the criminal charge, and [2] where there is reasonable basis in the evidence to support it, the viability of defense then becomes a question of fact and the jury should be charged regarding it.

State v. Harding, 635 P.2d 33, 34 (Utah 1981).

A. Justification is a legal defense. Section 76-2-401 of the Utah Code Annotated (1978) provides for "justification" as a complete defense to criminal responsibility:

> 76-2-401. Justification as defense--When Allowed--
> Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:
> (1) When the actor's conduct is in defense of persons or property under the circumstances described in sections 76-2-402 through 76-2-406 of this part;
> (2) When the actor's conduct is reasonable and in fulfillment of his duties as a governmental officer or employee;
> (3) When the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis;
> (4) When the actor's conduct is reasonable discipline of persons in custody under the laws of the state;
> (5) When the actor's conduct is justified for any other reason under the laws of this state.

Section 76-2-401 should be interpreted as authorizing the legal defense of justification against the charge of driving under the influence of alcohol. First, the initial statutory language allows the defense against "any offense," and subsections one through five should not be interpreted as exclusive in the absence of disjunctive or conjunctive language. Second, subsections one and five should be interpreted as allowing for the defense on the facts of this case.

In State v. Tuttle, 730 P.2d 630 (Utah 1986), the trial court instructed the jury on the defendant's defense of compulsion under §76-2-302, Utah Code Ann. (1978), agaisnt the charge of escape from official custody. The trial court, however, added three

qualifications to the instruction that were based on the Model Penal Code. In affirming the conviction, the Utah Supreme Court concluded that the trial court properly modified the statutory defense:

> The duress defense as enacted in Utah's current criminal code simply states the broadest contours of the defense as it might be raised against a criminal charge. Nothing in the 1973 Utah legislative history or in the commentary to the Model Penal Code indicates that the new code was intended to abolish subtle yet sound common law qualifications upon the defense as it relates to specific crimes that are consistent with its essential nature and that do not otherwise conflict with the provisions or the purposes of the new criminal code.

Id. at 633. Justification and compulsion are related statutory and common-law defenses. In the case at bar, the defendant's justification instruction (see Addendum B) is properly based on the Model Penal Code §3.02 and Comments (see Addendum C):

> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
> (b) neither Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Here, the State did not object to the wording of the justification instruction. The State did not propose an alternative justification instruction, nor did the trial court. The trial court simply ruled that there was inadequate evidence based on Tuttle, supra, to give the instruction because there may have been "a reasonable and legal alternative to violating the law," and because "the evidence [did] not support a finding of any threat or imminent use of unlawful force against the defendant." (T: 121). First, the harm sought to be avoided need not be directed against the defendant, but may, as here, be directed against a third person. See, e.g., §76-2-401(1), Utah Code Ann. (1978). Second, reasonable evidence was presented by the defendant on these issues. By refusing to instruct the jury the trial court usurped the jury's fact-finding function and denied the defendant the benefit of a jury trial.

Prejudice to the defendant in the court's refusal to instruct was exacerbated first by the centrality of justification to the defense (T: 152), and second by the prosecutor's comments during closing argument:

> MR. PARKER: About five minutes? Thank you, your Honor.
> I would like, first of all, to encourage you folks to take these instructions, first thing when you get into the room and read through all of them, and see if you ever find mentioned anywhere in these instructions the word "justification"--

> MR. SCOWCROFT: Your Honor, I object. I object. I call for--
> THE COURT: Well, it's closing argument, he has the right to cover the points you've raised.
> MR SCOWCROFT: I--well, okay. I just want that objection on the record, your Honor.
> THE COURT: All right, sir. But he does have the right to cover the points you raised.
> MR. PARKER: I ask you to try and find the argument the defense counsel just gave you. Find where the Judge told you that if some reason--if there was some reason for the defendant driving, that somehow you can excuse his conduct. You will not find it.

(T: 154).

B. <u>There is reasonable basis in the evidence to support the defense of justification</u>. At trial, Mr. Gonzales testified that he was alarmed because his son Walter had not returned home on the last-running bus at midnight. (T: 104-105). According to Mr. Gonzales and Dr. Afroz, Walter is mentally ill and potentially dangerous to himself and others. (T: 80-116). Mr. Gonzales testified that he had no alternative transportation to search for Walter because buses had stopped running and nobody else was available to drive him. (T: 106). Deputy Baird testified that he refused to help Mr. Gonzales find Walter. (T: 7). These facts could represent an imminent emergency that outweighs the harm of Mr. Gonzales driving his car, particularly as here where Mr. Gonzales' "driving pattern" did not present an immediate danger to others. (T: 66).

These facts create a "reasonable basis" in evidence to instruct the jury on defense of justification. The evidentiary threshhold set forth in Harding should be high enough to prevent irrelevant or confusing jury instructions, but low enough to allow defendants to present a legal defense to a jury. By refusing to instruct the jury on justification, the trial court denied Mr. Gonzales a fair trial and denied him the benefit of a jury trial guaranteed by Article I, §12 of the Utah Constitution.

C. The defense of justification has been recognized by other courts. In State v. Olson, 719 P.2d 55 (Or. App. 1986), the Court of Appeals of Oregon overturned a conviction for driving under the influence of intoxicants because the trial court refused to instruct the jury on a "choice of evils" defense provided under Oregon statute. There, the passenger drove the car out of a traffic intersection after the driver got out and walked away. The passenger was arrested and convicted for driving under the influence of alcohol. The court reasoned that the defendant was entitled to a jury instruction based on the law:

> Defendant's evidence was sufficient to support the choice of evils defense and to require the prosecution to rebut it. Whether the prosecution did that is for the trial court's determination as the fact-finder.

Id. at 57. The "choice of evils" defense is equivalent to the defense of justification. See Addendum D.

In State v. Pena, 197 Cal. Rptr. 264 (Cal. Super. 1983), a California Appellate Court reversed a conviction for driving under the influence of intoxicating liquor because the trial court refused to instruct the jury regarding the defense of "justification." There, the defendant pursued a sheriff's deputy by car at 4:00 a.m. who had taken his girlfriend away under circumstances which reasonably might have caused the defendant to fear for the girlfriend's safety. The reasoning in Pena should apply with added force to the case at bar because the instruction was not supported, as here, by an underlying California statute, but merely by common law principles. See Addendum D.

In State v. Knowles, 495 A.2d 335 (Me. 1985), the Supreme Judicial Court of Maine vacated convictions for driving on a revoked license and driving under the influence of alcohol because the trial court refused to instruct the jury on a "competing harms" defense. There, the defendant operated a motor vehicle to escape an assault upon himself and another person. The instruction was based on a Maine statute justifying otherwise criminal conduct where a defendant "believe[s] it to be necessary to avoid imminent physical harm to himself or another." Id. at 338. This defense is equivalent to defendant's defense of justification, and the reasoning in Knowles should be applied in support of defendant's instruction. See Addendum D.

In State v. Dapo, 470 A.2d 1173 (Vt. 1983), the Vermont Supreme Court held that the trial court did not err in failing to instruct the jury on defense of necessity. In Vermont, the defense of necessity was already defined in case law. the Supreme Court held that a necessary element of the defense - the existence of an emergency - was not supported by the record on appeal, and the defendant was therefore not entitled to the instruction. The court stated:

> . . . a missing child could very well represent an emergency so imminent and compelling as to raise a reasonable expectation of harm either to the actor or to the child. However, under the facts of this case, at the time of the defendant's criminal activity, the emergency had already terminated and, as the defendant knew, his child was safe at home.

Id. at 1175. The reasoning in Dapo should be applied to support instructing the jury on defense of justification in the case at bar. First, defense of necessity is equivalent to defense of justification, and Dapo recognized the validity of this defense. Second, the Vermont Supreme Court recognized that a missing child could be "an emergency so imminent and compelling" as to justify instructing the jury on such a defense. Third, the result in Dapo must be distinguished on its facts because in the case at bar the defendant's child was missing at the time of defendant's arrest. See Addendum D.

CONCLUSION

The trial court committed reversible error in refusing to instruct the jury on defense of justification. Mr. Gonzales was denied due process and a fair trial by jury. For these reasons the Court of Appeals should vacate the verdict and remand this case for a new trial.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING DOCUMENTS AND TESTIMONY WITHOUT PRIOR NOTICE TO THE DEFENDANT.

The defendant, through counsel, made a written Request for Discovery and mailed it to the office of the South Valley County Attorney on August 25, 1988. See Addendum E. This Request included the following:

> 2. A list of all the witnesses that the State/City intends to call for trial in the above-entitled matter, their addresses, telephone numbers and criminal records.
> 6. Any reports or results of scientific tests taken during the investigation of this case.

At some time prior to September 27, 1988, the South Valley County Attorney's office voluntarily mailed discovery to defense counsel, including a Salt Lake County Sheriff's Office Initial Report, DUI Report Form and Witness list. See Addendum F. Although the DUI Report Form indicates that an Intoxilyzer test was given, there were no Intoxilyzer documents ever made known or available to the defendant prior to trial. Nor was it indicated at section XIII of

the DUI Report Form that such documents existed. Also, the list of witnesses that the prosecutor intended to call at trial included only one name, that of Deputy Fred Baird.

At trial, Judge Jones allowed the prosecutor to introduce in evidence three Intoxilyzer documents, over defense objections, that were not known nor made available to the defense prior to trial. (T: 51-62). These were the Intoxilyzer Checklist, Affidavit and Receipt. Later during the trial Judge Jones allowed the prosecutor to introduce testimony, over defense objections, of a witness whose name was not included on the list of witnesses supplied to the defense whom the prosecutor intended to call at trial. This witness was Deputy Ken Davis. (T: 92-94).

Pretrial discovery of evidence is integral to legal due process and effective confrontation. See U.S. Const. amends. V and XIV, §1, and Utah Const. art. I, §12. Rule 16 of the Utah Rules of Criminal Procedure codifies the prosecutor's obligation to comply with a defendant's written request for discovery. See, §77-35-16, Utah Code Ann. (1982). In the case at bar, the defendant specifically requested a witness list and any reports of scientific tests. Disclosure of these items--if not mandated under subsections (a)(1) through (a)(4) of Rule 16--is required under 16(a)(5). In State v. Knight, the Utah Supreme Court interpreted this Rule:

> when the prosecution chooses to respond voluntarily to a request under subsection (a)(5) without requiring the defense to obtain a court order, considerations of

> fairness require that the prosecution respond to the request in a manner that will not be misleading. Therefore, we articulate two requirements that the prosecution must meet when it responds voluntarily to a request for discovery. First, the prosecution either must produce all of the material requested or must identify explicitly those portions of the request with respect to which no responsive material will be provided. Second, when the prosecution agrees to produce any of the material requested, it must continue to disclose such material on an ongoing basis to the defense. Therefore, if the prosecution agrees to produce certain specified material and it later comes into possession of additional material that falls within that same specification, it has to produce the later-acquired material.

734 P.2d 913, 916-917 (Utah 1987)(footnote omitted). The Court reasoned that a continuing obligation to disclose is in the interest of public policy by increasing confidence in informal discovery procedures and avoiding "game-playing" between the parties. Further, it is in the interest of judicial economy by reducing the need for frequent discovery requests by defense counsel and court-ordered discovery in an already-burdened criminal justice system. Id. at 917 ns. 2, 3; See also §77-35-16(b) ("The prosecution has a continuing duty to make disclosure.").

These standards were not met by the prosecutor in this case. The prosecutor admitted during the trial that he did not know whether the Intoxilyzer documents had ever been provided to the defense prior to trial. (T: 52). Good-faith ignorance of the prosecution is irrelevant in determining whether he has violated his discovery duties. Knight, 734 P.2d at 918 n.5.

The trial court is empowered under 16(g), Utah Rules of Criminal Procedure, to obviate any prejudice resulting from the prosecutor's violation of discovery rules:

> (g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

At trial, defense counsel asked the court to exclude from evidence the Intoxilyzer documents and the testimony of Deputy Davis. (T: 51-62; 92-94). The trial court denied any relief pursuant to defense objections.

The trial court abused its discretion in denying any relief because the prosecutor's failure to provide discovery resulted in prejudice sufficient to warrant reversal under Rule 30(a), Utah Rules of Criminal Procedure (§77-35-30, Utah Code Ann. (1982)):

> 77-35-30. Rule 30 - Errors and defects.
> (a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

Utah courts have interpreted this Rule as meaning that error is reversible only if absent the error there was a reasonable likelihood of a more favorable result for the defendant at trial. Knight, 734 P.2d at 919.

In the case at bar, the testimony of Deputy Davis constitutes reversible error because he was qualified as an "expert" by the State and testified that he had no doubt that Mr. Gonzales "was intoxicated beyond the legal point." (T: 95-96; 98; 101). Not having been informed that Deputy Davis would testify, defense counsel could not prepare to rebut that testimony with other eye-witness testimony, like that of Mrs. Gonzales.

Admission of the Intoxilyzer documents constitutes reversible error because absent those documents the State could not have established a presumption of validity of the Intoxilyzer test result. See Murray City v. Hall, 663 P.2d 1314, 1320 (Utah 1983). The State did not call a scientific expert to testify as to the validity of Intoxilyzer technology, nor was a public officer called to testify as to the accuracy of the Intoxilyzer equipment. Deputy Baird testified that he could not explain how the Intoxilyzer functions. (T: 70). Further, had it been known that the Intoxilyzer documents would be offered into evidence at trial, defense counsel could have prepared to rebut the presumption of validity through the expert testimony of Dr. Brian Finkle who has contracted with the Salt Lake Legal Defender Association to testify at DUI trials. Under either scenario there is a reasonable likelihood of a more favorable result for the the defendant at trial.

CONCLUSION

By admitting evidence not provided to the defendant in pretrial discovery, the trial court abused its discretion and denied Mr. Gonzales his constitutional rights of due process and confrontation. For these reasons, the Court of Appeals should reverse the conviction and remand this case for a new trial.

POINT III

THE TRIAL COURT ILLEGALLY SENTENCED THE DEFENDANT BY ENHANCING THE SENTENCE IMPOSED IN THE JUSTICE COURT.

On April 25, 1989, Mr. Gonzales entered a conditional plea of "no contest" in the Second Precinct Justice Court. See Addendum G. He was sentenced then and there as follows:

> Sentencing as follows: DUI - $480.00 + $120 Surcharge + $100.00 VR + $50.00 AR fee + 60 days in jail/57 suspended on (1) Payment of fines & fees-to be determined after stay date; (2) DUI series to be determined after stay date; (3) Probation to court 6 months-other 3 days are suspended on 24 hours community service.

Mr. Gonzales paid a $50 attorney referral fee on September 30, 1988. See Addendum G.

On July 14, 1989, Judge Jones resentenced Mr. Gonzales following trial as follows: 60 days jail, with three days suspended on 24 hours community service, and 57 suspended on (1) $480.00 fine to be paid within 60 days; (2) $120.00 surcharge to be paid within

60 days; (3) $100.00 Victim Restitution Fund assessment to be paid within 60 days; (4) $50.00 Alcohol Rehabilitation fee to be paid within 60 days; and (6) Six months probation supervised by the Alcohol Counseling and Education Center. (T: 164-165).

The sentence imposed by Judge Jones differed from that imposed in the justice court. First, Judge Jones imposed a $150.00 attorney fee, where the justice court imposed a $50.00 fee which the defendant paid on September 30, 1988. Second, Judge Jones ordered the defendant to pay all fines, fees and assessments (total $900.00) within 60 days of sentencing, where the justice court imposed no such order. Third, Judge Jones ordered that probation be supervised by the Alcohol Counseling and Education Center, where the justice court ordered unsupervised probation. In these three ways, Judge Jones sentenced Mr. Gonzales more severely than the justice court.

Imposition of a harsher sentence on appeal violates the defendant's constitutional rights to appeal and to legal due process by discouraging his legal defense. See Wisden v. District Court of Sevier County, 694 P.2d 605 (Utah 1984)(interpreting §76-3-405 Utah Code Ann. (1978)); see also U.S. Const. amends. V and XIV, §1, and Utah Const. art. I, §12.

CONCLUSION

Judge Jones illegally sentenced Mr. Gonzales by enhancing the sentence imposed in the justice court. For this reason the Court of Appeal should remand this case to the circuit court for resentencing with orders (1) that the $150.00 Legal Defender fee be

vacated; (2) that Mr. Gonzales not be required to pay fines, fees and assessments within 60 days, but rather as he is able to pay (see §78-32-1, Utah Code Ann. (1987)); and see Van Hake v. Thomas, 759 p.2d 1162 (Utah 1988)(In order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so), and (3) that supervision by the Alcohol Counseling and Education Center not be required as a condition of probation.

CONCLUSION

The trial court committed reversible error by refusing to instruct the jury on defense of justification, and by admitting documents and testimony into evidence that had not been provided to the defendant in pretrial discovery. As a result, Mr. Gonzales was denied a fair trial by jury, and the Court of Appeals should vacate the verdict and remand this case for a new trial.

Further, the trial court illegally sentenced Mr. Gonzales by enhancing the sentenced previously imposed in the justice court. For this reason, the Court of Appeals should remand this case to the circuit court for resentencing pursuant to its orders.

Respectfully submitted this 25 day of January, 1990.

Mark R. Moffat for
ROGER K. SCOWCROFT
Attorney for Defendant/Appellant

ADDENDUM A

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	
Plaintiff and Respondent,	)	CERTIFICATE OF PROBABLE CAUSE
	)	
v.	)	Case No. 890202-CA
	)	
Gilberto Gonzales,	)	
	)	
Defendant and Appellant.	)	

Before Judges Orme, Garff, and Davidson (On Law and Motion).

Upon defendant's application for a certificate of probable cause and consideration of the oral arguments and memoranda of the parties, we consider the issue challenging the sentence imposed by the circuit court to be fairly debatable and integral to defendant's conviction.

Therefore, defendant's application is granted and a certificate of probable cause is hereby issued.

DATED this 20th day of November, 1989.

FOR THE COURT:

Gregory K. Orme, Judge

ADDENDUM B

INSTRUCTION NO._____

DEFENSE OF JUSTIFICATION

Conduct which is justified is a defense to prosecution for any offense based on the conduct.

Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.

Therefore, if the defendant proves to your satisfaction that the above elements of justification did exist, and the prosecution does not negate the defense of justification beyond a reasonable doubt, it shall be your duty to return a verdict of not guilty.

ADDENDUM C

SECTION 3.02. JUSTIFICATION GENERALLY: CHOICE OF EVILS

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

COMMENTS TO §3.02 AT 5-9 [(TENT. DRAFT NO. 8, 1958)]

1. This Section accepts the view that a principle of necessity, properly conceived, affords a general justification for conduct that otherwise would constitute an offense; and that such a qualification, like the requirements of culpability, is essential to the rationality and justice of all penal prohibitions.

The principle is subject to three vital limitations:

(a) The necessity must be avoidance of an evil greater than the evil sought to be avoided by the law defining the offense charged. The balancing of evils cannot, of course, be committed merely to the private judgment of the actor; it is an issue for determination in the trial. What is involved may be described as an interpretation of the law of the offense, in light of the submission that the special situation calls for an exception to the prohibition that the legislature could not reasonably have intended to exclude, given the competing values to be weighed.

(b) The issue of competing values must not have been foreclosed by a deliberate legislative choice, as when the law has dealt explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the justification claimed otherwise appears . . .

(c) When the actor has made a proper choice of values, his belief in the necessity of his conduct to serve the higher value exculpates — unless the crime involved can be committed recklessly or negligently. But when the latter is the case, recklessness or negligence in bringing about this situation requiring the choice of evils or in appraising the necessity for his conduct may be the basis of conviction. . . .

ADDENDUM D

Before that he had worked on the green chain for another employer for six years. In January, 1983, he started feeling pain in his shoulders. By June, 1983, he was unable to continue working. In January, 1984, he filed a claim for compensation. He alleged that "[s]ixteen years on green chain either caused or accelerated the bilateral rotator cuff tendonitis." SAIF denied the claim.

Dr. Baker, claimant's treating orthopedic physician, diagnosed his problem as bilateral rotator cuff tendonitis with partially frozen shoulders "due to wear and tear over the past 60 years." He could not say with reasonable medical probability that claimant's problem was specifically caused by his work. He said that it was the result of wear and tear that must be attributed, at least in part, to claimant's work activity over the years and that he would not have reached his present level of disability had he not been working on the green chain or some equivalent activity.

Dr. Degge, an orthopedic physician, examined claimant at SAIF's request. He stated that, although the underlying condition may have been pre-existing and non-work related, his present problem "apparently developed * * * as a result of repetitive use of the arms while working on the green chain over a prolonged period." He concluded that "[w]hile the condition of [claimant's] neck and shoulders might have occurred as a natural progression of his chronic [pre-existing] condition, there is little doubt that the repetitive use of his arms in pulling, lifting, pushing, etc., accelerated this process *and would, therefore, constitute an aggravation of a pre-existing condition.*" (Emphasis supplied.)

In order to prevail, claimant had to prove by a preponderance of the evidence that his work activity and conditions caused a worsening of his underlying disease resulting in an increase in pain to the extent that it produced disability or required medical services. *Weller v. Union Carbide,* 288 Or. 27, 35, 602 P.2d 259 (1979).

We understand both doctors to have concluded that claimant's work on the green chain caused a worsening of his pre-existing condition. That worsening caused increased pain, which required him to seek medical services. Both doctors agree that he would not have reached his present level of disability without the effects of his employment. *See Kepford v. Weyerhaeuser Co.,* 77 Or.App 363, 366–67, 713 P.2d 625, *rev. den.* 300 Or. 722, 717 P.2d 630 (1986). We conclude that his condition is compensable. *Weller v. Union Carbide, supra.*

Reversed and remanded with instructions to accept claim.

79 Or.App. 302

STATE of Oregon, Respondent,

v.

Eric Leroy OLSON, Appellant.

M486112; CA A37579.

Court of Appeals of Oregon.

Argued and Submitted Feb. 10, 1986.

Decided May 14, 1986.

Defendant was convicted in the District Court, Multnomah County, Kimberly Frankel, J., of driving while under influence of intoxicants. The Court of Appeals, Young, J., held that defendant's evidence was sufficient to support choice of evils defense.

Conviction vacated and remanded.

1. Criminal Law ⇐38

Showing that defendant's driving of car was necessary to avoid injury or threat of injury to human or animal life was not an element of choice of evils defense to charge of driving while under influence of intoxicants, which is available if conduct is necessary as an emergency measure to

avoid imminent public or private injury. ORS 161.200(1)(a).

2. Criminal Law ⇐38

Nothing in choice of evils defense to driving while under influence of intoxicants prevents its use when defendant has acted to protect property rather than life. ORS 161.200(1)(a).

3. Criminal Law ⇐569

When defendant's evidence is sufficient to support choice of evils defense to charge of driving while under influence of intoxicants, prosecution must rebut it beyond a reasonable doubt. ORS 161.055(1), 161.190.

4. Criminal Law ⇐569

Defendant's testimony that he chose lesser evil of moving car out of intersection, although he was intoxicated, rather than leaving it in lane of traffic, sufficiently supported choice of evils defense to require prosecution to rebut evidence.

Garrett A. Richardson, Portland, argued the cause and filed brief for appellant.

Kendall Barnes, Asst. Atty. Gen., Salem, argued the cause for respondent. With him on brief were Dave Frohnmayer, Atty. Gen., and James E. Mountain, Jr., Salem.

Before JOSEPH, C.J., and VAN HOOMISSEN and YOUNG, JJ.

YOUNG, Judge.

Defendant was tried by the court and convicted of driving while under the influence of intoxicants (DUII). He appeals and claims that the trial court applied an incorrect legal standard in evaluating his choice of evils defense. We vacate the conviction and remand.

Officer Brunt saw defendant on the evening of November 23, 1984, in an argument with a woman in a restaurant parking lot. Brunt intervened and determined that defendant was intoxicated but that the woman was not. At Brunt's suggestion, defendant and the woman left in defendant's car, with her driving. A few minutes later Brunt saw the car stop in an intersection. The woman got out from the driver's side and walked away. After a moment, defendant moved to the driver's side and drove the car a short distance. Brunt then arrested him for DUII.

Defendant admitted that he was intoxicated and that he drove. His defense was that he chose the lesser evil of moving the car out of the intersection rather than leaving it in a lane of traffic. The defense is statutory. ORS 161.200. His motion for a judgment of acquittal on the ground that there was insufficient evidence to rebut the defense was denied. The trial court found defendant guilty, explaining that there was not sufficient evidence to support the choice of evils defense. Although that explanation is not entirely clear, it appears that the court rejected the defense as a matter of law.

[1, 2] In ruling on the motion and in announcing its verdict, the trial court apparently held that, in order to establish the defense, defendant had to show that his driving the car was necessary to avoid "injury or threat of injury to human or animal life." That is incorrect. That standard is only applicable to the affirmative defense provided by *former* ORS 487.560(2)(a) [1] to a charge of driving while suspended or revoked. It is not an element of the choice of evils defense under ORS 161.200, which is available if the conduct "is necessary as an emergency measure to avoid an imminent public or private injury." ORS 161.200(1)(a). The threatened injury must be

"of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoid-

1. *Former* ORS 487.560(2)(a) was repealed by Or.Laws 1983, ch. 338, § 978, *as amended* by Or.Laws 1985, ch. 672, § 6, and replaced by Or.Laws 1983, ch. 338, § 599, *as amended* by Or.Laws 1985, ch. 16, § 305; ch. 672, § 18; ch. 744, § 1 (now ORS 811.180(1)(a)).

ing the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue." ORS 161.200(1)(b).

There is nothing inherent in the choice of evils defense which prevents its use when the defendant has acted to protect property rather than life. *See State v. Haley*, 64 Or.App. 209, 215, 667 P.2d 560 (1983).

[3] Although an incorrect standard was applied, the trial court did not err in denying the motion for judgment of acquittal. Defendant's evidence supported the choice of evils defense, but it did not establish the defense as a matter of law. The court was correct in leaving that decision for the fact-finding process. However, the fact-finding process appears to have gone awry. Not only did the trial court impermissibly require proof of a threat to life, its comments indicate that it may have incorrectly placed the burden on defendant to prove the defense by a preponderance of the evidence, rather than requiring the prosecution to rebut it beyond a reasonable doubt. *See* ORS 161.055(1); ORS 161.190.

[4] Defendant's evidence was sufficient to support the choice of evils defense and to require the prosecution to rebut it. Whether the prosecution did that is for the trial court's determination as the fact-finder. Because the trial court applied an incorrect legal standard, its determination cannot stand. Nevertheless, a new trial is not warranted. The evidence has been presented, and the trial court need only evaluate that evidence under the correct standard. Accordingly, we vacate the conviction and remand to the trial court. On remand, if the court finds, on the present record, that the state has disproved the choice of evils defense beyond a reasonable doubt, it shall enter a new judgment of conviction; otherwise, defendant is entitled to an acquittal.

Conviction vacated; remanded for further proceedings not inconsistent with this opinion.

79 Or.App. 306

John McLEOD, Respondent,

v.

Carl FOSSI, Appellant.

43-302; CA A34610.

Court of Appeals of Oregon.

Argued and Submitted Nov. 1, 1985.

Decided May 14, 1986.

Review Denied July 29, 1986.

Action was brought seeking to enforce two promissory notes and claiming attorney fees under provision of the notes. The Circuit Court, Washington County, Alan C. Bonebrake, J., entered judgment finding that one note did not exist and defendant was not liable on the other, but denied defendant attorney fees, and defendant appealed. The Court of Appeals, Rossman, J., held that attorney fees were available under statute making attorney fee provisions reciprocal.

Reversed and remanded.

1. Costs ⇐173(1)

Under statute making attorney fee provisions reciprocal, if one party would be entitled to attorney fees under contract had it prevailed, other party is similarly entitled to award when it prevails. ORS 20.096(1).

2. Bills and Notes ⇐534

Party which successfully established nonliability under promissory notes in action in which party seeking to collect had prayed for attorney fees under contractual provision was entitled to attorney fees under statute making such attorney fee provisions reciprocal. ORS 20.096(1).

Charles S. Tauman, Portland, argued the cause for appellant. With him on briefs was Bennett, Hartman, Tauman & Reynolds, P.C., Portland.

William E. Hurley, Portland, argued the cause and filed brief for respondent.

this amended section as evidence of intended retroactivity. But Statutes 1982, chapter 1535, section 17, specifically states that "[i]f the [repeal of the inheritance tax is] declared invalid by an appellate court of this state as applied to estates of persons dying before the effective date of this act, to transfers occurring by reason of a death occurring before the date, or to gifts made or completed before that date, it is the intent of the Legislature that the provisions shall be applicable only to estates of persons dying on or after the effective date of this act."

[5] Appellant has overlooked the recent case of *Estate of Gibson* (1983) 139 Cal.App.3d 733, 189 Cal.Rptr. 201, in which the retroactive effect of Proposition 5 was explicitly rejected on the basis it was in irreconcilable conflict with Proposition 6, which received the higher affirmative vote. We concur with the reasoning set out in *Gibson*, and hold that the 1982 initiatives and legislation do not affect the estate of Floyd Martin.

The judgment is affirmed.

LOW, P.J., and KING, J., concur.

149 Cal.App.3d Supp. 14

The PEOPLE, Plaintiff and Respondent,

v.

Russell David PENA, Defendant and Appellant.

Crim. A. No. 20250.

Appellate Department, Superior Court, Los Angeles County.

Sept. 16, 1983.

Defendant was convicted before the Municipal Court, Los Angeles County, Alfonso D. Hermo, J., of driving under the influence of intoxicating liquor, and he appealed. The Superior Court, Appellate Department, Los Angeles County, Bernstein, J., held that: (1) defense of duress is available, presuming requisites of defense are satisfied, where defendant is charged with driving under the influence; (2) defense of duress may properly be predicated upon threats of harm to persons other than accused; and (3) refusal to instruct jury regarding availability of defense of duress was error.

Reversed.

1. Criminal Law ⇐38
Homicide ⇐126

Duress defense is available to defendant charged with any crime except one which involves taking life of an innocent person.

2. Criminal Law ⇐38

Defense of duress is available, presuming requisites of such defense are satisfied, where defendant is charged with driving under the influence of intoxicating liquor. West's Ann.Cal.Vehicle Code § 23152(a).

3. Criminal Law ⇐38

Statute enumerating classes of persons who are incapable of committing acts which constitute crimes does not restrict application of duress type defenses to cases in which defendant's person is object of coercive threats of bodily harm. West's Ann.Cal.Penal Code § 26.

4. Criminal Law ⇐38

Defense of duress may properly be predicated upon threats of harm to persons other than accused.

5. Criminal Law ⇐739(1)

Determinations as to whether prerequisites to establishment of defense of justification/duress have been satisfied are for trier of fact.

6. Automobiles ⇐352

Defendant would be entitled to acquittal of charge of driving under the influence, notwithstanding fact of his operation of motor vehicle while legally intoxicated, in view of fact that duress was defendant's only defense to charge of driving under the influence, refusal to instruct jury regarding availability of defense was prejudicial error.

7. Criminal Law ⇐38

Requirement of defense of duress that defendant's fear be objectively reasonable one does not require that defendant be in fact correct in his assessment of situation; rather, defendant may rely on what he reasonably believes to be true.

8. Automobiles ⇐356

Whether defendant had reasonable belief that girl friend who was ordered to enter deputy's vehicle, was in danger from deputy, for purpose of establishing defense of duress in prosecution for defendant's driving under the influence in following deputy's vehicle, was question of fact.

9. Criminal Law ⇐830

Defendant's omission from requested duress instruction of requirement that defendant's fears for girl friend be objectively reasonable did not relieve trial court of its duty to fashion legally adequate instruction in response to defendant's request.

10. Automobiles ⇐357
Criminal Law ⇐1173.2(3)

In view of fact that duress was defendant's only defense to charge of driving under the influence, refusal to instruct jury regarding availability of defense was prejudicial error.

Richard L. Dewberry, Whittier, for defendant and appellant.

Robert H. Philibosian, Dist. Atty., Donald J. Kaplan and Sterling S. Suga, Deputy Dist. Attys., for plaintiff and respondent.

BERNSTEIN, Judge. [17]

Appellant, Russel David Pena, appeals his conviction for violation of former Vehicle Code section 23102, subdivision (a)[1], driving under the influence of intoxicating liquor. Appellant contends the trial court erred in refusing his proffered jury instruction, regarding appellant's theory of his defense. That theory was predicated on the presumed availability of what is generally termed the defense of duress.[2] We hold that the defense was indeed available to appellant, and that the evidence adduced at trial mandated a jury instruction on the subject. Accordingly we reverse the judgment of conviction.

FACTS

On November 5, 1981, appellant was charged by complaint with violations of former Vehicle Code sections 23102, subdivision (a)[3] (count I) and 12500, subdivision

1. Vehicle Code section 23102, subdivision (a) was renumbered section 23152, subdivision (a) in 1981 (Stats.1981 ch. 940 §§ 12, 33).

2. In this opinion, "duress" is used interchangeably with terms such as "coercion," "compulsion," "necessity" or "justification." Although there are some distinctions, they are not material for purposes of this opinion. For a discussion of these distinctions see Conde, *Necessity Defined: A new Role in the Criminal Defense System* (1981) 29 UCLA L.Rev. 409, 427-432, Frank D. Berry, Jr. *The Mysterious Defense of Necessity* (1979) 54 State Bar J. 384.

3. Vehicle Code section 23102, subdivision (a) as it read on November 5, 1981 provided as follows:

"(a) It is unlawful for any person who is under the influence of intoxication liquor or under the combined influence of intoxication liquor and any drug, to drive a vehicle upon any highway."

(a)[4] (failure to have driver's license, count II) and Health and Safety Code section 11357, subdivision (b)[5] (possession of less than one ounce of marijuana, count III). Counts II and III were subsequently dismissed on motion of the People pursuant to Penal Code section 1385. Appellant was tried by jury on count I; a mistrial was declared on May 25, 1982, when the jury reported itself to be hopelessly deadlocked. The engrossed settled statement on appeal states that: "[d]uring deliberations (following appellant's first trial), the jurors requested instruction on the issue of the defense of justification, ..." and were instructed by the court that it was not available as a defense to the charge

Appellant's second jury trial commenced on October 5, 1982. The difficulties experienced by the second jury are reflected in the municipal court docket:[6]

On October 29, 1982, the court sentenced appellant to one year in the county jail.[7]

The evidence presented at appellant's trial was essentially undisputed. Los Angeles County Sheriff's Deputy Frank Webb testified that he first encountered appellant at approximately 4 a.m. on November 1, 1981. Webb, on patrol in Pico Rivera, observed appellant and Sara Marrufo, appellant's girlfriend, asleep in a parked car.[8] Webb stated that "due to the late hour," he decided to investigate the situation. He exited his patrol vehicle and approached

4. Section 12500, subdivision (a) provides:

"(a) No person shall drive a motor vehicle upon a highway unless he then holds a driver's license issued under this code, except such persons as are expressly exempted under this code."

5. Section 11357, subdivision (b) provides:

"(b) Except as authorized by law, every person who possesses not more than one avoirdupois ounce of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100)."

6. "COURT INSTRUCTS JURY: THEY WERE SWORN:
Jury retires to deliberate at 3:05 p.m. Jury returns to courtroom at 4:15 p.m. for rereading of the jury instructions.
4:17 p.m. jury retires to deliberate further. Jury returns to courtroom at 4:38 p.m. for rereading of jury instructions.
39 p.m. jury retires to deliberate further. Jury returns to courtroom at 4:50 p.m.,
'We the jury in the above-entitled cause find the defendant guilty of the offense charged to wit 23102(a) V.C. signed Foreman.'"

7. Although appellant does not challenge the validity of his sentence, we are constrained to point out, for guidance of the parties in the event of a retrial, that the sentence is of dubious validity.

The trial court pronounced sentence in apparent reliance upon appellant's "admission" of three prior convictions for violations of (former) Vehicle Code section 23102, subdivision (a). However, the complaint in the instant case (M 147948, Whittier Mun.Ct.) establishes that each of the prior offenses alleged occurred more than five years before the date of the "offense" in the instant matter. Specifically the complaint alleges as follows:

Case No.	Municipal Court	Date of Offense	Date of Conviction
M 92945	El Monte	9-18-74	2-7-75
M 106902	Whittier	2-7-75	1-27-76
M 116056	Whittier	Feb., 1976	2-22-77

In the instant case, the operative statutes specifying permissible punishment for driving under the influence are former Vehicle Code section 23102, subdivisions (c) and (d). These subparagraphs provided in pertinent part:

"(c) Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail not less than 48 hours nor more than six months or by a fine of not less than three hundred fifty-five dollars ($355) nor more than five hundred dollars ($500) or by both such fine and imprisonment.

"(d) Any person convicted under this section of an offense which occurred within five [illegible] resulted in a conviction of an offense under this section or section 23105 shall be punished by imprisonment in the county jail for not less than 48 hours nor more than one year and by a fine of not less than three hundred fifty-five dollars ($355) nor more than one thousand dollars ($1,000)."

Thus, it plainly appears that appellant could not be sentenced to a jail term longer than the six months maximum specified in subparagraph (c), above.

8. It was stipulated at trial that the car was parked on private property.

the parked car, at which time he stated that he smelled alcohol. Webb then ordered the occupants, appellant and Sara, to exit their vehicle and demanded to see written identification. Both parties complied. Following this, Webb undertook a search of the "suspects" assertedly to ascertain if either of them were in possession of "weapons." Sara, at the time she was subjected to Deputy Webb's "weapons search," was dressed in a somewhat unusual manner. She was wearing a long fur coat and, according to the engrossed statement, "was semi-nude thereunder, wearing only a very brief see-through teddy nightgown" (Sara testified that she and appellant had attended a Halloween costume party earlier in the evening, and that her costume was supposed to be that of a "flasher"). Webb ordered Sara to open her coat, which she did very briefly. Webb thereupon ordered her to again open her coat and to keep it open. Deputy Webb then examined Sara's body with his flashlight. Following this examination, the deputy turned Sara around and pulled her coat up from the rear and continued his examination with the flashlight.

During his interrogation and search of appellant and Sara Marrufo, Deputy Webb ascertained the following:

1. The vehicle in which appellant and his girlfriend had been sleeping was registered to Sara's sister;

2. Appellant lived "about one block" from the location of the events above described;

3. Sara lived about three miles from the location;

4. Sara's identification showed her to be 20 years of age.

Deputy Webb concluded the encounter by ordering Sara to enter his vehicle inasmuch as the deputy had decided to take Sara home. Webb's only asserted reason for this action was that it was for Sara's "protection."[9] Webb drove from the scene with Sara in tow, leaving appellant in possession of Sara's sister's vehicle.

Appellant testified that he followed Webb and Sara in the sister's car. His reason for doing so was his fear for the physical safety of his girlfriend. Appellant had observed Webb's earlier weapons search of Sara; it is at this point the only conflict in the evidence develops. Deputy Webb testified that he drove Sara directly home and only after this, while "exiting Sara Marrufo's doorway," did he observe "an unusual black shadow" which proved to be appellant. Appellant was sitting in the vehicle earlier described, with the motor running. Recalling the alcohol odor at the scene of his original encounter with appellant and Sara, Webb felt that appellant had driven to his current location while under the influence of alcohol. He ordered appellant out of the vehicle and, according to Webb, thereupon administered field sobriety tests which appellant failed. Webb then arrested appellant. Subsequently, appellant took an "intoxilyzer" (breath) test which showed appellant's blood alcohol level to be approximately .15.

However, according to Sara, Webb stopped his car "by some railroad tracks"; at that point, Webb observed appellant to be following them. Webb stated to Sara that appellant "would be made sorry" for following them. Webb then started his vehicle up again and drove to Sara's residence.

Appellant testified concerning his arrest by Webb as follows: After he was ordered out of the car in which he had followed Webb and Sara, appellant was immediately arrested and handcuffed by Webb. Appellant asserted that no field sobriety tests were administered to him by Webb, although he admitted to Webb that he had consumed several beers at the Halloween party he had earlier attended with Sara.

At both trials, appellant requested that the following instruction be given to the jury:

"Evidence has been received to the effect that the reason defendant, Russell

9. The record is devoid of any suggestion that Deputy Webb possessed the legal authority to take Sara home, or anywhere else, against her wishes.

Pena, drove the car was because he believed that Sara Marrufo was in physical danger."

"You are hereby instructed that if you find that it has been established by a preponderance of the evidence that the defendant had a good faith belief that Sara Marrufo might be in physical danger, and drove the car for her protection or to render possible aid, then you may acquit him based on this defense."

[1] The trial court not only refused appellant's tendered instruction, but further instructed the jury, upon the panel's inquiry during its deliberations, that the defense of "justification" was in fact no defense to the charge.

The sole question on appeal is whether the trial court committed reversible error in refusing to instruct the jury, either by way of appellant's tendered instruction or a similar, court fashioned charge, regarding the applicability of the defense of duress.

Upon Proper Evidentiary Showing The Defense of Duress Is Available To Any Criminal Charge Other Than A Capital Offense

The United States Supreme Court has recently had occasion to discuss the defenses of duress and necessity in the context of a prosecution for escape from lawful confinement. In *United States v. Bailey* (1980), 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575, the high court observed as follows:

"Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim the defense of necessity. See Generally *LaFave and Scott* 374-384." (444 U.S. at p. 409, 100 S.Ct. at p. 634.)

Although California law regarding the "justification" defenses (i.e., "duress," "necessity," "compulsion," etc. see, fn. 2, *ante*) appears sparse in comparison to that of most American jurisdictions, there nonetheless exist several Court of Appeal decisions which provide some guidance as to the parameters of those defenses—most recently the court in *People v. Patrick* (1981) 126 Cal.App.3d 952, 179 Cal.Rptr. 276, noted that:

"*Although the exact confines of the* necessity defense remain clouded, a well-established central element involves the emergency nature of the situation, i.e., the imminence of the greater harm which the illegal act seeks to prevent. (See *State v. Johnson* (1971) 289 Minn. 196 [183 N.W.2d 541, 543, 45 A.L.R.3d 1432].) The commission of a crime cannot be countenanced where there exists the possibility of some alternate means to alleviate the threatened greater harm." (126 Cal.App.3d at p. 960, 179 Cal.Rptr. 276.)

[2] In the leading California case regarding the applicability of the duress defense to a charge of prison escape, *People v. Lovercamp* (1974) 43 Cal.App.3d 823, 118 Cal.Rptr. 110, the court fashioned a five part judicial test for determining the availability of the defense. In such cases, the *Lovercamp* court observed that it was not formulating a new rule of law, but rather was applying "rules long ago established in a manner which effects fundamental justice." (43 Cal.App.3d at p. 827, 118 Cal.Rptr. 110.) In *People v. Graham* (1976) 57 Cal.App.3d 238, 129 Cal.Rptr. 31, it was held that the burden of proof in cases in which duress was asserted by a defendant, required only that the defendant "raise a reasonable doubt that he had acted in the exercise of his free will." (57 Cal.App.3d

Two issues of apparent first impression in this jurisdiction must be addressed before disposition of the instant appeal can be effected:

(1) Is the duress/necessity defense available to a defendant charged with misdemeanor driving under the influence?

(2) Is the duress/necessity defense available to a defendant who commits an unlawful act in an effort to prevent imminent harm to a third party?

[1] With respect to the first question, it appears settled that the duress defense is available to a defendant charged with *any* crime except one which involves the taking of the life of an innocent person. (15 Am. Jur.Crim.Law § 31A; also see annotation entitled Coercion, compulsion, or duress as defense to criminal prosecution, 40 A.L.R.2d 908.) Typical case authority for this proposition is represented by holdings such as the following: "It is established by the great weight of authority that although coercion does not excuse taking the life of an innocent person, yet it does excuse in all lesser crimes." (*State v. St. Clair* (Mo. 1953) 262 S.W.2d 25, 27.) "We hold that duress is an affirmative defense to a crime other than murder. ..." (*State v. Toscano* (1977) 74 N.J. 421, 378 A.2d 755, 756.) The logic which compels the availability of such defenses is described in *Frasher v. State* (1970) 8 Md.App. 439, 260 A.2d 656, 661:

"It is essential to a crime that the defendant committed a voluntary act .... The voluntary requirement of the criminal act relates directly to compulsion; it is a defense as to all crimes except taking the life of an innocent person that the defendant acted under a compelling force of coercion or duress. 1 Wharton's Criminal Law (Anderson) Section 123, P. 261. The compulsion may be by necessity, that is duress arising from circumstances, or by the application of duress on the defendant by another person." [10]

[2] Thus, we hold that the defense of duress, is available, presuming other requisites of such a defense are satisfied, where a defendant is charged with the violation of Vehicle Code section 23152, subdivision (a).

The Duress Defense is Applicable To Situations In Which The Threatened Harm Is To Persons Other Than The Defendant

It appears that no California case has directly addressed the question of whether the duress defense is available in situations wherein the coercive circumstances arise from threatened harm not to the defendant personally, but to some party other than the accused. The classic example is that of a bank teller whose child has been kidnaped. The kidnapers order the teller to use his position of trust at the bank to embezzle money for the kidnapers. The teller is informed that his child will be killed if he does not comply with the demands. The teller himself is not threatened with bodily harm. Would an embezzlement under such circumstances constitute a crime? (See Conde. *Necessity Defined: A New Role in the Criminal Defense System* (1981) 29 UCLA L.Rev. 409, 438-439.)

It appears that virtually every jurisdiction in which the issue has been settled permits threats to third parties to satisfy the requisite coercive circumstance requirement so as to bring the duress defense into play. Perhaps the best articulation of the rationale for permitting threats to persons other than the defendant to allow invocation of these defenses, appears in a Massachusetts case. *Commonwealth v. Martin*

10. Two cases, both from Texas, specifically deal with the applicability of the justification defenses to prosecutions for driving while intoxicated. These cases, *Bush v. State* (1981) Tex.App., 624 S.W.2d 377 and *Duson v. State* (1977) Tex.Cr.App., 559 S.W.2d 807—recognize the applicability of such defenses to the charge of driving under the influence (although both cases held that the necessary elements of the proffered defenses were not factually established). (See, also, *Browning v. State* (1943) 31 Ala.App. 137, 13 So.2d 54 [defense of compulsion held to excuse crime of reckless driving]; *State v. Ragland* (1967) 4 Conn.Cir. 424, 233 A.2d 698 [illegal parking].)

(1976) 369 Mass. 640, 341 N.E.2d 885, 891-892:

"Whatever the precise precedents, it is hardly conceivable that the law of the commonwealth, or, indeed, of any jurisdiction [fn. omitted], should mark as criminal those who intervene forcibly to protect others; for the law to do so would aggravate the fears which lead to the alienation of people from one another, an alienation symbolized for our time by the notorious Genovese incident. [Footnote omitted.] To the fear of "involvement" and of injury to oneself if one answered a call for help would be added the fear of possible criminal prosecution. [Fn. omitted.]"

The *Martin* court observed that some European countries have passed laws making it a criminal offense *not* to render aid in certain circumstances:

"It is instructive that the laws of some countries in Continental Europe denounce as a crime the failure to render help in given circumstances. See J.P. Dawson, Negotiorum Gestio: The Altruistic Intermeddler, 74 Harvard Law Review 817, 1073, 1101-1114 (1961). Thus art. 330c of the West German Criminal Code, as amended in 1953, provides (translation by Professor Dawson): 'Whoever does not render help in cases of accident, common danger or necessity although help is required and under the circumstances is exactable, and in particular is possible without danger of serious injury to himself and without violation of other important [Wichtige] duties, will be punished by imprisonment up to one year or by fine.' *Id.*, at 1104-1105." (341 N.E.2d at p. 891, fn. 12.)

[3] In the case at bench, the People contend that Penal Code section 26[11] restricts the application of duress type defenses to cases in which the defendant's person is the object of coercive threats of bodily harm. The People's argument cannot withstand scrutiny. To begin, nothing in the language of section 26 can be construed as limiting the applicability of the duress-necessity defenses to the circumstances therein described. The section merely enumerates the classes of persons who, under the circumstances contemplated by the statute, are *incapable of committing acts which constitute crimes.* Nothing in the statute can be read to require the conclusion that a person not so enumerated, i.e., a person who *is* capable of committing a crime, has in fact committed one by his action in a given case. Indeed, other sections of the Penal Code explicitly authorize, under certain circumstances, the commission of acts which ordinarily would constitute crimes. In particular, we refer to Penal Code sections 692-694:

"Lawful resistance to the commission of a public offense may be made:

"1. By the party about to be injured;

"2. By other parties." (Pen.Code, § 692.)

"Resistance sufficient to prevent the offense may be made by the party about to be injured:

"1. To prevent an offense against his person, or his family or some member thereof.

"2. To prevent an illegal attempt by force to take or injure property in his lawful possession." (Pen.Code, § 693.)

"Any other person in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense." (Pen.Code, § 694.)

Case law construing the above quoted sections of the Penal Code uniformly holds that it is not necessary that the threatened harm be actual, only that it reasonably appear so: "Justification does not depend on the existence of actual danger but on appearances. [Citations.]" (*People v. Collins* (1961) 189 Cal.App.2d 575, 588, 11 Cal.Rptr. 504. See, also, *People v. McKee* (1968) 265 Cal.App.2d 53, 61, 71 Cal.Rptr. 26; *People v. Jackson* (1965) 233 Cal.App.2d 639, 641-643, 43 Cal.Rptr. 817.)

[4] We hold that a defense of duress may properly be predicated upon threats of harm to persons other than the accused.

Elements of the Duress Defense

The following requirements have traditionally been held to be prerequisites to the establishment of the defense of justification/duress:

1. The act charged as criminal must have been done to prevent a significant evil;[12]

2. There must have been no adequate alternative to the commission of the act;[13]

3. The harm caused by the act must not be disproportionate to the harm avoided;[12]

4. The accused must entertain a good-faith belief that his act was necessary to prevent the greater harm;[14]

5. Such belief must be objectively reasonable under all the circumstances; and

6. The accused must not have substantially contributed to the creation of the emergency.

[5] These determinations are for the trier of fact.

We recognize that, under the requirements listed above there is no suggestion that the harm sought to be avoided be that of death or great bodily injury. Penal Code section 26, subdivision six provides that persons who commit acts (other than capital offenses) otherwise constituting crimes, while in reasonable fear for their lives should they refuse to commit the act, cannot be held criminally liable. As we stated earlier, Penal Code section 26, subdivision six is not coextensive with the parameters of the duress defense. Indeed it is clear that this subdivision merely addresses itself to one particular circumstance within the general requirement that the charged act must not cause harm disproportionate to the harm avoided. Under the circumstances contemplated by section 26, subdivision six, the harm sought to be avoided is the loss of life of the actor. Since no act undertaken by the threatened party in such circumstances (other than the commission of a capital offense) would cause a harm disproportionate to the harm to be avoided, it is clear that the subdivision is merely descriptive of one set of possible circumstances falling within the ambit of the duress defense. However, as we have pointed out, the defense of duress is not limited to situations wherein the accused acted in reasonable fear of his life. Other sections of the Penal Code (i.e., §§ 692, 693, 694 see *infra*) explicitly permit the commission of acts otherwise criminal, under circumstances where the actor need not be in fear of his life to be able to avail himself of the duress defense. Under the "disproportionate harms" requirement, it is plain that as the harm sought to be avoided decreases in seriousness the duress defense will excuse fewer and fewer acts undertaken to avoid that harm.[15]

11. Penal Code section 26 provides:

"All persons are capable of committing crimes except those belonging to the following classes:

"One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

"Two—Idiots.

"Three—Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

"Four—Persons who committed the act charged without being conscious thereof.

"Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

"Six—Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

12. See, e.g., *Cleveland v. Municipality of Anchorage* (Alaska 1981) 631 P.2d 1073, 1078.

13. See, also, *United States v. Bailey, supra* (duress and necessity) "Under any definition of these defenses one principle remains constant: If there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail.'" (444 U.S. at p. 411, 100 S.Ct. at p. 635.)

14. *People v. Patrick, supra,* 126 Cal.App.3d at page 962, 179 Cal.Rptr. 276.

15. This is the reason that the justification defenses are sometimes referred to as the "choice of evils" defense.

Lastly, with respect to the oft-cited "imminence" requirement of the defense, it is apparent that this requirement is included within the more general "no alternative" requirement. Obviously, the more imminent the peril, the less likely the existence of an alternative course of action. (See, also, *State v. Toscano, supra*, 378 A.2d at pp. 762-765.)

Appellant Was Entitled To An Instruction On the Defense of Duress

[6] We now evaluate the merits of the instant appeal in light of the foregoing legal principles. Appellant would be entitled to an acquittal of the charge against him, notwithstanding the fact of his operation of a motor vehicle while legally intoxicated, if he could convince the jury of the truth of the following:

(1) That he held a genuine belief that Sara Marrufo was in danger of assault by or through Deputy Webb;

(2) That appellant's good faith belief was objectively reasonable under the totality of the circumstances;

(3) That appellant operated his vehicle in obedience to his fear for Sara's safety and not for any other purpose;

(4) That appellant had no opportunity to engage alternative legal means of protecting Sara from the danger he believed she faced;

(5) That appellant was not substantially at fault in the creation of the emergency situation which he claims justifies his action in driving while intoxicated.

[7,8] We observe that the requirement that appellant's fear be an objectively reasonable one does not require that appellant be in fact correct in his assessment of the situation. Rather, as in any situation where a defendant claims as his defense that the charged acts were justified as having been undertaken in response to some emergency circumstance (i.e., self-defense), the defendant may rely on what he reasonably believes to be true. Whether appellant, in the instant case, had a reasonable belief that Sara was in danger from Deputy Webb is a question of fact. That Webb seemed clearly to be an on-duty police officer may be a factor to consider in assessing the reasonableness of defendant's fear, but it is certainly not the only such factor.[16] Other considerations which the jury could properly weigh include the credibility of Deputy Webb's asserted reason for taking Sara from the scene against her apparent wishes, the reasonableness or unreasonableness of Webb's detention and search of appellant and Sara and the character of his search of Sara in particular.

[9,10] We note that in appellant's first trial, the jury during its deliberations, returned to the courtroom and requested from the court instructions on the "defense of justification." The court advised the jury that the defense of justification was not available as a defense to the charge. The first jury was unable to reach a verdict. At the second trial, we know from the docket, that the jury experienced considerable difficulty in dealing with the instructions. We also know that at both trials there was a request from the appellant for a specific instruction on the defense of duress and that the instruction was refused.[17] In view of the fact that duress was appellant's only defense, it was error for the trial court to refuse to instruct the jury regarding the availability of this defense.

CONCLUSION

We hold that the defense of justification was available to the appellant herein and the failure to so instruct the jury constituted prejudicial error. Accordingly, the judgment is reversed.

FOSTER, P.J., and COOPERMAN, J., concur.

16. Police officers, on duty or otherwise, have been known to commit crimes. Further, recent events demonstrate the possibility that police officers may be impersonated. Thus, we cannot hold that Deputy Webb's status as a law enforcement officer required, as a matter of law, that appellant be convinced of Webb's benign intention toward Sara.

17. The instruction requested by appellant was defective in at least one particular, i.e., it omitted the requirement that defendant's fears for Sara be objectively reasonable. However, that does not relieve the trial court of its duty to fashion a legally adequate instruction in response to appellant's request.

"The trial judge was not required to adopt the language suggested by a defendant in the Court's instructions to the jury; however, when a theory of defense finds some support in the evidence and in the law, a defendant is entitled to some mention of that theory in the instructions. *United States v. Swallow*, 511 F.2d 514 (10th Cir.1975). Even when the supporting evidence is weak or of doubtful credibility its presence requires an instruction on the theory of defense. *Tatum v. United States*, 88 U.S.App.D.C. 386, 190 F.2d 612 (1951)."

149 Cal.App.3d Supp. 41

The PEOPLE, Plaintiff and Respondent

v.

Leroy S. JONES, Defendant and Appellant.

Cr. A. 1123.

Appellate Department, Superior Court, San Bernardino County.

Sept. 26, 1983.

Defendant was convicted in the Municipal Court, San Bernardino County, Dan L. Rankins, J., and Thomas Parry, Temporary Judge, of failing to file state income tax returns, and he appealed. The Superior Court, Appellate Department, Ziebarth, P.J., held that: (1) statute making it a crime to fail to file state income tax returns does not violate due process because it is a strict liability statute which does not require scienter; (2) evidence was insufficient to support claim of discriminatory prosecution premised on defendant's membership in tax protester group; (3) evidence was sufficient to support jury finding that defendant actually received his earnings in years in which he did not file state income tax return; and (4) prosecutor was not required to show that defendant intended to evade requirements of the statute.

Affirmed.

1. Criminal Law ⇐20

Certain kinds of regulatory offenses, not common-law crimes and classified as "malum prohibitum" rather than "malum in se," are punishable despite absence of criminal intent in any of its accepted senses.

2. Constitutional Law ⇐285.2
Taxation ⇐952

Statute making it a crime not to file state income tax return does not violate due process because it is a strict liability statute which does not require scienter, since power to tax is certainly with state's police power and failure to file returns and pay taxes could be destructive of the social order. West's Ann.Cal.Rev. & T. Code § 19401; U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐569

Evidence in prosecution for failing to file state income tax returns was insufficient to support claim of discriminatory prosecution based on defendant's membership in tax protester group.

4. Criminal Law ⇐338(2)

Circumstantial evidence is an acceptable form of proof, even in criminal cases.

5. Taxation ⇐1103

Evidence in prosecution for failure to file state income tax returns, including testimony of fellow employee of defendant that defendant never complained about not getting paid, was sufficient to support jury finding that defendant actually received his earnings in years he did not file tax returns.

(*United States v. Garner* (6th Cir.1976), 529 F.2d 962, 970. See, also, *People v. Sedeno* (1974) 10 Cal.3d 703, 716, 112 Cal.Rptr. 1, 518 P.2d 913.)

sion to be other than a just one. Although the wife brought more assets to the marriage than did the husband, the husband was the couple's sole source of income for the first year of the marriage, and contributed a significant portion of the income thereafter. In light of these circumstances, the decision to make an equal division was not an abuse of discretion by the divorce court.[1]

Whether the division was in fact equal is another issue. The wife squarely condemns the divorce court's finding that "the marital property in the possession of the Plaintiff and Defendant is substantially equal and therefore each party should keep that property." The wife further argues that the divorce court erred in failing to make specific findings as to the value, identity, and location of items of personal property. Although the unsworn lists of items and values submitted to the court by the parties were markedly disparate, the divorce court did not indicate on whose appraisal reliance was placed.

[7, 8] In a case such as this it may be impracticable and nearly impossible for the divorce court to make a specific finding as to the value and location of each chattel with which the court is dealing. Here that problem is exacerbated by the parties' disagreement as to both values and locations, their disputes with some of the values assigned by the independent appraiser, and their failure in many instances to offer evidence of value apart from their own respective estimates. While we deplore the divorce court's failure to state upon which appraisal or appraisals the court was relying, *cf. Shirley v. Shirley*, 482 A.2d 845, 849 (Me.1984), nevertheless the court was certainly entitled to rely upon the evidence the court found most credible.

Moreover, upon the court's issuance of its findings of facts and conclusions of law, pursuant to M.R.Civ.P. 52(b), the Plaintiff could have easily requested further findings, specifically addressing the estimated values upon which the court was relying. This she failed to do. Therefore, we cannot now say that the court's omission of more specific findings as to value constitutes reversible error.

[9, 10] Finally, the wife contends that the Superior Court erred in failing to award her periodic alimony or a lump sum. The divorce court is afforded considerable discretion in its decision as to alimony. *See, e.g., Skelton v. Skelton*, 490 A.2d 1204, 1207 (Me.1985); *Shirley*, 482 A.2d at 847. In the instant case, we find no abuse of this discretion. The wife left the marriage, which was of relatively short duration, with substantial assets. In addition, she had the ability to support herself as a counselor and an antique dealer. The ruling therefore was not inappropriate.

The entry is:

Judgment affirmed.

All concurring.

STATE of Maine

v.

Linwood KNOWLES.

Supreme Judicial Court of Maine.
Argued May 2, 1985.
Decided July 12, 1985.

Defendant was convicted in the Superior Court, Somerset County, of operating a

1. In *Shirley v. Shirley*, 482 A.2d 845, 849 (Me. 1984), we voiced our disapproval of the trial court's dividing the marital property according to who currently had possession. However, we found that because the Plaintiff had failed to provide estimates of values, we could not determine whether the division was inequitable. In the instant case, in contrast, both parties supplied estimates, and an independent appraisal of many, but not all, antiques was performed.

motor vehicle after his right to operate had been revoked because he was a habitual offender and of operating a motor vehicle while under the influence of intoxicating liquor, and he appealed. The Supreme Judicial Court, Violette, J., held that trial court improperly denied defendant's request for an instruction on competing harms to effect that, though he was alleged to have operated his van while intoxicated and under license suspension, such operation could be justified because he believed it to be necessary to avoid imminent physical harm to himself or another.

Judgment vacated, and case remanded for proceedings consistent with opinion.

1. **Criminal Law** ⇐772(6)

A defendant is entitled to a jury instruction on a particular defense when he can point to the existence of evidence sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the fact finder to entertain regardless of whether it is the prosecution or the defendant or both who produce the evidence. 17-A M.R.S.A. § 103, subd. 1.

2. **Criminal Law** ⇐43.5

Inconsistent defenses may generally be interposed in a criminal case such as when a defendant pleads both not guilty and not guilty by reason of insanity to the same charge.

3. **Criminal Law** ⇐56(11)

Reliance upon a particular defense by the defendant should not automatically relieve the prosecution of its burden to prove all the elements of the crime charged beyond a reasonable doubt.

4. **Criminal Law** ⇐330

The denial of the criminal act by the defendant should not relieve the prosecution of its burden to negate any defense generated by the evidence.

5. **Criminal Law** ⇐43.5.

It was not inconsistent for the defendant to deny that he had operated his van while intoxicated and under license suspension and at same time assert that his operation of the van could be justified under the doctrine of competing harms because he believed it to be necessary to avoid imminent physical harm to himself or another. 17-A M.R.S.A. § 103, subd. 1; 29 M.R.S.A. §§ 1312-B, 2298; Rules Crim.Proc., Rule 11(a).

6. **Criminal Law** ⇐720(6)

The prosecution is free to point out an inconsistency in the assertion of defenses by the defendant during the trial and at the time of argument.

7. **Criminal Law** ⇐43.5

A defendant should have the option of presenting inconsistent defenses to the fact finder as long as there is evidence, from whatever source, that could rationally support those defenses.

8. **Criminal Law** ⇐772(6)

Trial court improperly denied defendant's request for an instruction on competing harms to effect that, though he was alleged to have operated his van while intoxicated and under license suspension, such operation could be justified because he believed it to be necessary to avoid imminent physical harm to himself or another. 17-A M.R.S.A. § 103, subd. 1; 29 M.R.S.A. §§ 1312-B, 2298; Rules Crim. Proc., Rule 11(a).

John Alsop (orally), Asst. Dist. Atty., Skowhegan, for plaintiff.

Vafiades, Brountas & Kominsky, Jeffrey L. Hjelm (orally), Bangor, for defendant.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, VIOLETTE, GLASSMAN and SCOLNIK, JJ.

VIOLETTE, Justice.

After a jury trial in the Superior Court, Somerset County, the defendant was convicted of operating a motor vehicle after his right to operate had been revoked because he was a habitual offender, 29 M.R.

S.A. § 2298 (Supp.1984), and operating a motor vehicle while under the influence of intoxicating liquor, 29 M.R.S.A. § 1312-B (Supp.1984). The sole issue on appeal is whether the trial court erred when it refused to instruct the jury on the competing harms defense, 17-A M.R.S.A. § 103 (1983). We determine that the court improperly denied the defendant's request for such an instruction. We therefore sustain the appeal.

On the afternoon of July 13, 1984, the defendant, Linwood Knowles, and several other people travelled to Skowhegan in a van owned by Knowles. They drove to the parking lot of the Midtown Hotel. Robert Harris operated the van on this trip to Skowhegan. Knowles's right to operate had been revoked because he was a habitual offender, 29 M.R.S.A. § 2292 (Supp. 1984).

After the group arrived at the Midtown parking lot, Knowles went alone to the hotel bar. According to Knowles, he expected to meet a friend, Crystal, later at the bar. With permission from the owner of the Midtown, Knowles recorded some music from the bar's jukebox with a tape machine that he had brought with him.

At some point, there was a confrontation between Knowles and another person at the bar, Walter Moody. Moody and several of his friends assaulted Knowles. Knowles left the hotel area and called the Skowhegan Police Department to report the beating. The dispatcher, Antonio Lemieux, told Knowles not to return to the hotel, and that an officer might assist him if he came to the police station. Knowles told Lemieux that he had to return to the Midtown bar to get his keys. According to Lemieux, Knowles sounded intoxicated.

Knowles then returned to the Midtown bar. He was again assaulted by Moody and his friends. After this beating, Knowles walked to the Skowhegan Police Department to seek assistance. He spoke with Sergeant Asselin. Both Sergeant Asselin and Antonio Lemieux observed Knowles to be very intoxicated at this time. Sergeant Asselin warned Knowles not to start trouble at the Midtown and told him not to drive anywhere. The sergeant informed Knowles that he would be on patrol near the hotel bar in case there was any problem.

Knowles then went back to his van in the parking lot at the Midtown. There, he spoke with Dwayne and Dorothy Bennett, two people who had accompanied him on the trip to Skowhegan that afternoon, and who had returned to the van to wait for him. Knowles told them that he was going into the bar to find his friend Crystal and that they would then all leave the Midtown. Moody and his friends again assaulted Knowles and would not let him enter the bar. Dwayne Bennett went into the bar and retrieved Knowles's tape machine for him. At that point, Dwayne and Dorothy Bennett left the area on foot.

Knowles testified that Crystal then appeared in the parking lot near his van. At this point, Knowles stated, Moody and his friends were still assaulting him. According to Knowles, Crystal got inside the van. Knowles testified that he then got into the passenger seat of the van. Knowles stated that either Dwayne Bennett or Crystal had retrieved his keys from inside the bar. According to Knowles, he then told Crystal to drive to a nearby pay phone to call the State Police. Knowles testified that Crystal drove the van over to the pay phone. Upon seeing Moody and his friends approaching them, Knowles stated, he began to look for his shotgun in his van to defend himself and Crystal, who was attempting to use the pay phone. Knowles testified that he was in the driver's seat of the van when he saw a police cruiser arrive at the scene.

After Knowles had left the Skowhegan Police Station, Sergeant Asselin had driven to and parked at a point where he could observe the parking lot of the Midtown bar. The sergeant later observed Knowles's van proceeding through this parking lot. Sergeant Asselin then followed the van and pulled up next to it at a point where it had

stopped. Sergeant Asselin testified that the driver was the only person he observed in the van when he was following it, and that Knowles was seated behind the steering wheel when he pulled up next to the van. The sergeant further stated that, when he arrived, there was no female in the area who could have been Crystal. According to Sergeant Asselin, Knowles, who was still intoxicated, stated that he drove the van to save someone's life. The sergeant then placed Knowles under arrest.

Knowles maintained that he never operated the van. According to Knowles, Crystal disappeared shortly after the police cruiser arrived.

At the close of the evidence at trial, the defendant asked the presiding justice to instruct the jury on the defense of competing harms under 17-A M.R.S.A. § 103.[1] The justice determined, however, that, because the defendant testified that he did not operate the van, he was not entitled to an instruction that his operation of the van could be justified under the doctrine of competing harms. The defendant renewed his request before the jury retired to deliberate. The justice again refused to give the instruction.

[1] A defendant is entitled to a jury instruction on a particular defense when he "can point to the existence of ... evidence sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the factfinder to entertain." *State v. Glidden*, 487 A.2d 642, 644 (Me. 1985); *see State v. Reed*, 459 A.2d 178, 181 (Me.1983); *State v. Bahre*, 456 A.2d 860, 866 (Me.1983); *State v. Greenwald*, 454 A.2d 827, 830 (Me.1982). This is true whether it is the prosecution or the defendant or both who produce the relevant evidence. *Glidden*, 487 A.2d at 644; *State v. Kee*, 398 A.2d 384, 386 (Me.1979).

In the case at bar, the presiding justice did not even reach this question of whether the competing harms defense was generated by the evidence. Rather, the justice refused to give the instruction because he determined, as a matter of law, that a defendant who denies that he committed the crime cannot also assert the inconsistent defense that he did commit the crime because he "believe[d] it to be necessary to avoid imminent physical harm to himself or another," 17-A M.R.S.A. § 103(1).

[2-4] "Generally, inconsistent defenses may be interposed in a criminal case." *State v. Harris*, 189 Conn. 268, 271, 455 A.2d 342, 344 (1983); *see United States v. King*, 587 F.2d 956, 965 (9th Cir.1978); *Johnson v. United States*, 426 F.2d 651, 656 (D.C.Cir.1970) (per curiam); *cf.* M.R. Crim.P. 11(a) ("A defendant may plead both not guilty and not guilty by reason of insanity to the same charge."). "The rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution." *United States v. Demma*, 523 F.2d 981, 985 (9th Cir.1975) (en banc). Reliance upon a particular defense by the defendant should not automatically relieve the prosecution of its burden to prove all the elements of the crime charged beyond a reasonable doubt. *See id.* at 986; *People v. Perez*, 62 Cal.2d 769, 776, 44 Cal.Rptr. 326, 329, 401 P.2d 934, 938 (1965); *Harris*, 189 Conn. at 271-276, 455 A.2d at 344-45; *State v. Branam*, 161 N.J.Super. 53, 59-62, 390 A.2d 1186, 1190-91, *aff'd* 79 N.J. 301, 399 A.2d 299 (1978). Similarly, the denial of the criminal act by the defendant should not relieve the prosecution of its burden to negate any defense generated by the evidence.[2] *See King*, 587 F.2d at 965 (defend-

1. Section 103(1), in pertinent part, provides:
   Conduct which the actor believes to be necessary to avoid imminent physical harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the crime charged.

2. The State must disprove beyond a reasonable doubt the existence of any defense generated by the evidence. 17-A M.R.S.A. § 101(1) (1983); *see Glidden*, 487 A.2d at 644.

ant's denial of drug transfer could not relieve prosecution of burden of refuting evidence that alleged transfer, if made by defendant, was in the course of his professional practice).

The State, however, insists that "it is ... against logic and common sense" to allow a defendant to assert the competing harms defense after he denies that he committed the crime. For authority, the State relies exclusively upon decisions concerning whether a defendant who denies the underlying criminal conduct may also invoke the defense of entrapment.

[5] Although many courts have refused to permit a defendant who denies the underlying criminal conduct to rely upon the entrapment defense as well, the decisions are "both literally and figuratively spread all over the map on this question." *United States v. Valencia*, 645 F.2d 1158, 1170 (2d Cir.1980).[3] We express no opinion ourselves regarding whether a defendant in Maine may rely upon the entrapment defense if he denies that he engaged in the criminal act. It is sufficient for us to say that there is nothing about the competing harms defense that would prompt us in this case to depart from the principle that a defendant may assert inconsistent defenses.

[6, 7] We note that the assertion of inconsistent defenses may be an unwise [4] and therefore unlikely tactical choice.[5] *See Demma*, 523 F.2d at 985. The prosecution is free to point out such an inconsistency in the defendant's case during trial and in argument. *State v. Hinds*, 485 A.2d 231, 238–39 (Me.1984). The defendant should have the option of presenting inconsistent defenses to the fact finder, however, as long as there is evidence, from whatever source, that could rationally support those defenses.

[8] We conclude that the trial court erred by refusing to instruct the jury on the competing harms defense because of its determination, as a matter of law, that the defendant could not assert inconsistent defenses. If the competing harms defense was generated by the evidence, from whatever source, the defendant was entitled to an instruction on it, regardless of the fact that he denied committing the underlying criminal acts.

The entry is:

Judgment vacated.

Remanded for proceedings consistent with the opinion herein.

All concurring.

STATE of Maine

v.

Daniel FLICK.

Supreme Judicial Court of Maine.
Argued May 9, 1985.
Decided July 12, 1985.

Defendant invoked an exception to the final judgment rule in order to appeal from

3. Federal and state cases, respectively, dealing with this topic are collected at Annot., 54 A.L.R. Fed. 644 (1981), and Annot., 5 A.L.R.4th 1128 (1981).

4. In the context of the entrapment defense, one court has gone so far as to remark that "it is difficult to conceive of a competent attorney arguing to a court and jury that the defendant did not [commit the criminal act], but, if so, he was entrapped." *United States v. Liparota*, 735 F.2d 1044, 1048 (7th Cir.1984) (quoting *United States v. Kaiser*, 138 F.2d 219, 220 (7th Cir. 1943)), *rev'd on other grounds*, 471 U.S. ——, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985).

5. Illustrative is *State v. Boilard*, where the defendant made a "tactical decision not to argue ... justification [under 17-A M.R.S.A. § 104 (1983)], for fear of weakening the primary defense of denial of assaultive conduct." 488 A.2d 1380, 1390–91 (Me.1985).

STATE of Vermont

v.

Roger L. DAPO.

No. 82-201.

Supreme Court of Vermont.

Dec. 2, 1983.

Defendant was convicted in the District Court, Unit No. 2, Chittenden Circuit, Alden T. Bryan, J., of operating motor vehicle while under influence of intoxicating liquor, and he appealed. The Supreme Court, Billings, C.J., held that: (1) delay of 37 days between impaneling of jurors and trial was not prejudicial, and (2) trial court did not err in failing to charge defense of necessity.

Affirmed.

1. Criminal Law ⇐854(2)

In misdemeanor cases, discretion of trial court controls issue of separation of jury, and burden of demonstrating abuse of this discretion is on party claiming the abuse, but all that is required is showing of existence of circumstances capable of prejudicing deliberative function of jury and not that jury was prejudiced in fact.

2. Criminal Law ⇐854(1)

Each case involving separation of jury will be decided on its own facts.

3. Criminal Law ⇐1174(4)

In prosecution for driving under the influence, delay of 37 days between jury impaneling and swearing-in did not require reversal where defendant's counsel was allowed to conduct second voir dire at time of trial and, after conducting the voir dire, expressed his client's satisfaction with the jury, where defendant verbally and in writing agreed to proceed with the 11-member jury when two of the jurors were unavailable on day set for trial, and where there was no showing of any circumstance that might have occurred during separation that was capable of tainting jury's deliberative duty. 23 V.S.A. § 1201(a)(2); U.S.C.A. Const.Amend. 6.

4. Jury ⇐9

Defendant's right to trial by properly constituted and impartial jury is constitutionally guaranteed and must not be threatened by mere administrative convenience in advance drawing of juries.

5. Criminal Law ⇐38

Elements of defense of necessity are: there must be situation of emergency arising without fault on part of actor concerned, the emergency must be so imminent and compelling as to raise reasonable expectation of harm to actor or upon those he was protecting, the emergency must present no reasonable opportunity to avoid injury without doing criminal act, and injury impending from emergency must be of sufficient seriousness to outmeasure criminal wrong.

6. Criminal Law ⇐772(6)

In prosecution for driving under the influence, trial court did not err in failing to charge defense of necessity where, even if defendant's missing child represented an emergency, defendant knew that emergency had terminated and his child was safe at home at time of his arrest.

7. Criminal Law ⇐1134(3)

Claim of ineffective assistance of counsel must be brought through collateral attack under postconviction proceedings rather than on direct appellate review.

Dena Monahan, Chittenden County Deputy State's Atty., Burlington, for plaintiff-appellee.

Saxer, Anderson & Wolinsky, Burlington, for defendant-appellant.

Before BILLINGS, C.J., and HILL, UNDERWOOD, PECK and GIBSON, JJ.

BILLINGS, Chief Justice.

Defendant appeals from a conviction of operating a motor vehicle while under the influence of intoxicating liquor (DUI). 23 V.S.A. § 1201(a)(2). He asserts three claims of error: (1) that the delay of 37 days between jury impaneling and swearing-in was prejudicial as a matter of law; (2) that the trial court failed to charge the jury with the defense of necessity; and (3) that he was prejudiced by ineffective assistance of counsel.

Around 11:50 p.m. on November 20, 1981, defendant was awakened by a telephone call from his ex-wife, informing him that one of their children had failed to return to her home from a daytime outing. Defendant borrowed a car and proceeded to look for his son, eventually meeting up with him at the Burlington police station. Shortly after returning his son to his ex-wife's home, defendant was stopped by a Burlington police officer, taken to the police station and processed for DUI.

On February 22, 1982, a jury of thirteen was drawn, but not sworn, for defendant's March 31, 1982, trial. On the day set for trial, only eleven of the thirteen jurors were available. The trial judge and defendant's attorney questioned defendant both as to his understanding that he had a constitutional right to a twelve member jury and that a mistrial would be declared if he did not then wish to go forward with the trial. After the defendant indicated his willingness to go forward, the trial judge questioned him further to insure that the prospect of increased litigation costs, if a mistrial were declared, was not compelling defendant's decision to proceed with the eleven member jury. Although defendant expressed some concern over litigation costs, he again expressed his willingness to go forward and signed a statement acknowledging his voluntary waiver of his right to a twelve member jury. The trial court then allowed defendant's counsel to voir dire the jury, after which defendant's counsel indicated satisfaction with the jury as constituted.

[1, 2] In misdemeanor cases, the discretion of the trial court controls the issue of separation of the jury. *State v. White*, 129 Vt. 220, 225–26, 274 A.2d 690, 693–94 (1971). "[I]t is for the trial court to weigh concern for the prompt, orderly administration of criminal law against the possibility of jury prejudice in a given case." *State v. Brisson*, 124 Vt. 211, 214, 201 A.2d 881, 883 (1964). The burden of demonstrating an abuse of this discretion is on the party claiming the abuse, but all that is required is a showing of "the existence of circumstances capable of prejudicing the deliberative function of the jury," and not that the jury was prejudiced in fact. *Id.* at 215, 201 A.2d at 883. Each case involving the separation of the jury will be decided on its own facts. *Id.* at 214, 201 A.2d at 883.

In *State v. White, supra*, 129 Vt. at 226, 274 A.2d at 694, this Court held that a separation of 62 days between impaneling and trial was prejudicial as a matter of law. The defendant in *White* had been charged with possession of a regulated drug, marijuana. 18 V.S.A. § 4224(a). The separation of the jury occurred during a time when marijuana, because of the perceived novelty of its use, was a very sensitive and much touted issue. *Id.* at 225, 274 A.2d at 693. In *State v. Brisson, supra*, 124 Vt. at 214, 201 A.2d at 883, a jury separation of ten days, in a misdemeanor case, was found not to be prejudicial as a matter of law, nor on the facts of that particular case. Prior to the jury's separation, the court had cautioned the jury members to avoid activities which might prejudice its deliberative function. *Id.* at 212, 201 A.2d at 882. Additionally, at trial, the defendant did not demonstrate the occurrence of any event during separation that might have tainted the jury's impartiality. *Id.* at 214, 201 A.2d at 883. Similarly, in *State v. Stevens*, 137 Vt. 473, 408 A.2d 622 (1979), a sixteen day separation in a DUI case was held not to be prejudicial where the court conducted a second voir dire at the trial's commencement and offered to treat defendant's motion to dismiss as a motion for mistrial if

any improper influence affecting the jury could be demonstrated. *Id.* at 476, 408 A.2d at 624.

[3] In the instant case, the record is silent as to whether the court admonished the jury, prior to separation, to avoid any activity that might affect its impartiality. However, the court did allow defendant's counsel to conduct a second voir dire at the time of trial. On the basis of this voir dire, counsel for defendant expressed his client's satisfaction with the jury as constituted. Defendant, verbally and in writing, agreed to proceed with the eleven member jury. Additionally, there was no showing of any circumstance that may have occurred during separation that was capable of tainting the jury's deliberative duty. Finally, defendant made no claim of error in this regard until after the verdict. Considering the totality of circumstances, we cannot say that the defendant has demonstrated the existence of prejudice in law or fact. The trial court was acting within its discretion when it proceeded with the trial.

[4] We do, once again however, express strong concern and reservation as to the continued propriety of advance drawing of juries. We recognize the increasing burdens on trial court calendars, but a defendant's right to a trial by a properly constituted and impartial jury is constitutionally guaranteed and must not be threatened by mere administrative convenience. The shorter the period of separation, the less likely that prejudice and abuse of discretion will be found on appeal.

[5] Defendant next claims that the trial court erred in failing to instruct on the defense of necessity. Defendant did not request the charge but properly claims that the trial court must fully and correctly charge upon each point indicated by the evidence that is material to a decision of the case. *State v. Gokey,* 136 Vt. 33, 36, 383 A.2d 601, 602 (1978). The defense of necessity, as recognized in Vermont, requires evidence in the record that supports the elements of the defense. *State v. Shotton,* 142 Vt. 558, 561, 458 A.2d 1105, 1106 (1983). These elements are:

(1) there must be a situation of emergency arising without fault on the part of the actor concerned;

(2) this emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;

(3) this emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and

(4) the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong.

Id. at 560–61, 458 A.2d at 1105 (quoting *State v. Warshow,* 138 Vt. 22, 24, 410 A.2d 1000, 1001–02 (1980)).

[6] The court did not err in failing to charge the defense of necessity. Certainly defendant's missing child was an occurrence that arose without fault attributable to him. And, a missing child could very well represent an emergency so imminent and compelling as to raise a reasonable expectation of harm either to the actor or to the child. However, under the facts of this case, at the time of defendant's criminal activity, the emergency had already terminated and, as the defendant knew, his child was safe at home.

[7] We do not reach defendant's third claim, that of ineffective assistance of counsel. Such a claim must be brought through collateral attack under post-conviction proceedings, rather than on direct appellate review. *State v. Loehmann,* 143 Vt. 372, 467 A.2d 118 (1983); *State v. Campanelli,* 142 Vt. 362, 366, 454 A.2d 1248, 1251 (1982).

Affirmed.

ADDENDUM E

ROGER K. SCOWCROFT
Salt Lake Legal Defender Association
Attorney for Defendant
424 East 500 South, #300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE JUSTICE COURT OF PRECINCT NO. TWO,

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	REQUEST FOR DISCOVERY
Plaintiff,	:	
-v-	:	
GILBERTO GONZALES,	:	Case No. 2-1983-121B
Defendant.	:	

The defendant, GILBERTO GONZALES, by and through his/her attorney of record, ROGER K. SCOWCROFT, pursuant to Utah Code Ann. Section 77-35-16 (1953 as amended) and the Due Process of Clauses of Constitutions of Utah and the United States, hereby requests the following materials be provided to him ten days prior to trial now set for September 27, 1988.

1. Any evidence which tends to negate the guilt of the defendant, or mitigate the guilt of the defendant or mitigate the degree of the offense for reduced punishment that has been discovered by any member of the agencies involved in the investigation or prosecution of the above-entitled case.

2. A list of all the witnesses that the State/City intends to call for trial in the above-entitled matter, their addresses, telephone numbers and criminal records.

3. Any recordings, reports, transcripts or reports about statements in possession of any member, or group involved in the prosecution of the investigation of the above-entitled case taken from the witness listed in number 2.

4. Any photographs or physical evidence from the alleged crime scene or taken by any such law enforcement officer procured during the course of the investigation of the above entitled case by such police department, County Attorney, its staff or investigative agencies.

5. Statements made by the defendant to any of the State's witnesses and the dates, times, places and persons present when such statements were made.

6. Any reports or results of scientific tests taken during the investigation of this case.

7. Any reports made by non-governmental agencies involved including reports made by any state security personnel.

8. Any police or investigative reports, excluding the Salt Lake County Attorney's or Salt Lake City Prosecutor's work product, made during the course of the investigation or prosecution of this case.

9. Reports or descriptions or any weapon or other physical evidence seized from defendant's person or his residence or vehicle that the State/City intends to use at trial.

10. Any offers of leniency or plea bargain agreements or any other form of remuneration provided to any of the witnesses listed in number 2 and 3 above.

11. A copy of the booking sheet.

11. A copy of the booking sheet.

WHEREFORE, defendant moves that the Court issue an Order granting the relief sought.

DATED this 23 day of August, 1988.

ROGER K. SCOWCROFT
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing Request for Discovery to the office of the South Valley County Attorney's Office, 2001 South State, #S3700, Salt Lake City, Utah 841190-1200 this 30 day of August, 1988.

ADDENDUM F

DAVID E. YOCOM
Salt Lake County Attorney
By: W.C. GWYNN
Deputy County Attorney
2001 South State, Room #S3700
Salt Lake City, Utah 84190-1200
Telephone: (801) 468-3422

IN THE JUSTICE COURT, STATE OF UTAH

SALT LAKE COUNTY, SECOND PRECINCT

THE STATE OF UTAH,	)	
Plaintiff,	)	INFORMATION
v.	)	Case No: 2-1984
GILBERTO A. GONZALES DOB: 06/14/42	)	CAO NO. 88-3-03914
Defendant.	)	

The undersigned, DEPUTY BAIRD - S.O., under oath states on information and belief that the defendant(s) committed the crimes of:

COUNT I
DRIVING OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE HAVING A BLOOD ALCOHOL CONTENT OF 0.08 PERCENT OR GREATER; OR WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS, a Class B Misdemeanor, in Salt Lake County, State of Utah, on or about August 4, 1988, in violation of Title 41, Chapter 6, Section 44, Utah Code Annotated, 1953, as amended, in that the defendant, GILBERTO A. GONZALES, a party to the offense, did appear or was in actual physical control of a motor vehicle within this state while having a blood or breath alcohol content of 0.08 percent or greater, by weight, as shown by a chemical test given within two hours after the alleged operation or physical control or while under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which rendered the defendant incapable of safely operating a vehicle.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

Deputy Fred Baird 673E S.O.

Citation #D09076

DEFENDANT'S ADDRESS: 4311 West 4985 South, Kearns, Utah 84118

_____
Affiant

Subscribed and sworn to before me
this _____day of August, 1988.

_____
JUDGE

Authorized for presentment and filing:

DAVID E. YOCOM,
Salt Lake County Attorney

/s/W.C. GWYNN
_____
Deputy County Attorney
sk/08-31-88/1955I

SALT LAKE COUNTY SHERIFF'S OFFICE

abs.

INITIAL REPORT

Offense Description	Offense Code	Grid NBR	Report Date	Time Dispatched	Tran Code	Case Number
DUI ARREST	10-55		8/4/88	0035	D	88-71326

Deputy Number	Division	Residence Phone	Phone Index	Address of Occurrence	Date of Occurr
673E	EAST PATROL			3900 South 250 WEST	8/4

Status: A Active ☐ I Inactive ☐ C Cleared ☒ Completed ☐ D Unfounded ☐ U CRP ☐ T ARP ☐ Y

Business, Victim or Complainant:	D.O.B.	Name Index	Address:	Time of Occur
Deputy F.C. BAIRD				0035 hrs

Business Pho: 272-522

ARRESTEE: NAME: GILBERTO A. GONZALEZ DOB: 6/4/1942 RACE: HISPANIC SEX: MALE

ADDRESS: 4311 WEST 4985 South

ADDITIONAL CHARGES:

STATE DUI CITATION NUMBER: D09076

TRAFFIC ACCIDENT INVOLVED: YES ☐ NO ☒

VEHICLE IMPOUND:

VEHICLE OWNER: NAME Gilberto A. GONZALEZ DOB: 6-4-1942

ADDRESS: 4311 WEST 4985 South HOME PHONE 967-2071 BUS. PHONE

VEHICLE DESCRIPTION: YEAR 1975 MAKE CADILLAC MODEL DEVILLE LICENSE # 596-CC

STYLE 2 DR. COLOR BROWN VIN # 6D47550264215

INVENTORY: VISIBLE DAMAGE Both Doors / molding

KEYS Left IN IGNITION

STEREO/TAPE DECK IN DASH

MISSING PARTS N/A

PROPERTY IN VEHICLE WRENCH

REASON FOR IMPOUND: DUI

STATE TAX IMPOUND # 255232

TOWING SERVICE: Hinkley's VEHICLE STORED AT: 2775 South 300 WEST

ADDITIONAL INFORMATION: Driver taken into custody for DUI and transported to the Traffic office for a breath test & subsequently released & his wife and taken home by UTE Tafoya

Offense 2	Offense 3	Weapons Used	Type of Premise
		Gun ☐, Knife/Cutting Instr. ☐, Other Dang. Weapons ☐, Strong Arm/Threats ☐, Not Spec./Unknown ☐	Hwy./Rd. ☐ Comm. House ☐ Gas Station ☐ Conv. Store ☐ Res. ☐ Bank ☐ Other/ Not Spec.

Entrance ViA: Door ☐ Roof ☐ Window ☐ Basement ☐ Fence ☐ Other/Not Spec. ☐

Property Entrance Means: Screwdriver ☐ Pry Bar ☐ Rock/Brick ☐ Slipped Lock ☐ Hack Saw ☐ Explosives ☐ Wrench ☐ Pliers/Vice Grips ☐ Wire Cutters ☐ Manual Force ☐ Other/Not Spec. ☐

Stolen Value Type	Recovered Value Type	Vandalized Value Type	Lost/Found Value Type	Property Types & Values See Stamp ☐	When Offense Occured
					Day D ☐ Night N ☐ Unknown

Officer Assaulted/Killed: Weapon ___ Assign. ___ Activity ___ Injury ___

Suicide: Age ___ Method ___ Motive ___ Sex ___

No. Cars

Stolen/Recovered Auto Codes

Stolen Locally, Recovered Locally 1 ☐

Stolen Locally, Recovered Elsewhere 2 ☐

Stolen Elsewhere, Recovered Locally 3 ☐

Arrestee Information: Total ___ (More Infor. – See Stamp ☐)

Date	Offense	Deputy	Age	Race	Sex
Date	Offense	Deputy	Age	Race	Sex

Distribution

RECORDS ___ AUTO ___ PATROL ___ BIKE ___

DETECTIVE ___ TRAFFIC ___ TAC-SQD ___

JUVENILE ___ VICE ___ PRESS ___

JUV. COURT ___ NARCOTICS ___

Deputy Signature: F.C. Baird

Approved by:

CITATION NO.
D 09076

DUI REPORT FORM

I. CASE IDENTIFICATION:

Date 8-4-88 Day THURSDAY Accident NO Case # 88-71326 Time Prepared 0100 Hrs
Subject's Name GILBERTO A. GONZALEZ Address 4311 WEST 4985 South, Kearns
Place of Employment Hilton Hotel-SLC Address
Home Telephone Number 967-2071 Work Telephone Number Hilton Hotel-House Keeping
D.O.B. 6-4-1942 Driver License # 145896895 Time of Arrest 0045 Hrs
Place of Arrest 3900 South 250 WEST Charges DUI
Arresting Officer FRED BAIRD Assisting Officers KEN DAVIS
Arresting Agency SLCSO

II. VEHICLE

Year 1975 Color BROWN Make CADILLAC Model DEVILLE
License # and state 596 CCC Disposition STATE TAC-DUI
Registered Owner GILBERTO A. GONZALEZ Address 4311 WEST 4985 South

III. WITNESSES: (If passengers, indicate specifically)

Name	Address	Tele. #	Age/DOB
1.			
2.			
3.			
4.			
5.			

IV. ACTUAL PHYSICAL CONTROL:

The facts establishing the subject's actual physical control of a motor vehicle are: ONLY OCCUPANT of VEHICLE - personally observed him driving vehicle WEST Bound on 3900 South.

V. DRIVING PATTERN:

Subject's location when first observed 3900 South 300 East
The facts observed regarding driving pattern: OBSERVED SUSPECT VEHICLE DRIVING WEST BOUND ON 3900 South IN THE MIDDLE OF THE ROAD AT 300 EAST I CONTINUED TO FOLLOW SUSPECT VEHICLE FROM 300 EAST TO STATE ST. AND OBSERVED THAT VEHICLE STAYED ON THE CENTER OF THE ROAD IN MEDIAN STRIP.

VI. PRE-ARREST STATEMENTS OF SUBJECT:

I ONLY HAD TWO BEERS - I DON'T KNOW WHY YOU ARE STOPPING ME.

VII. PHYSICAL CHARACTERISTICS:

Odor of alcoholic beverage STRONG
Speech SLURRED - VERY DIFFICULT TO UNDERSTAND - BLOODSHOT EYES
Balance STUMBLED EXITING VEHICLE - DIFFICULTY IN STANDING
Signs or complaints of injury or illness NONE
Other physical characteristics WHITE SHORT SLEEVE SHIRT / BLUE SHORTS / SHOES -

II. FIELD SOBRIETY TESTS: (describe subject's actions)

1. BALANCE - WOULD NOT CLOSE EYES - SWAYED Feet and heath - ALMOST FELL DOWN
2. FINGER COUNTING - COULD NOT PERFORM TEST - COULD NOT COUNT - JUST TOUCHED FINGERS
3. HAND CLAP - PERFORMED TEST BUT DID NOT COUNT 1 THRU 5 JUST CLAPPED HANDS
4.
5.

Were tests demonstrated by officer? YES Subject's ability to follow instructions POOR -

K. **SEARCHES**

A. Vehicle:
Was subject's vehicle searched? YES Where? 3900 South 250 WEST
When? 0050 hrs Evidence NONE
Person who performed the search KEN DAVIS

B. Subject:
Was subject's person searched? YES Where? 3900 South 250 WEST
When? 0045 hrs Evidence Found NONE
Person who performed the search FRED BAIRD

L. **CHEMICAL TESTS:**
Mr. or Mrs. GILBERTO A. GONZALEZ, do you understand that you are under arrest for driving under the influence of alcohol (drugs)? Response, (if any) YEAH I KNOW

I hereby request that you submit to a chemical test to determine the alcohol (drug) content of your blood. I request that you take a INTOXILYZER test.
(blood-breath-urine)

☐ The following admonition was given by me to the subject before the chemical test was administered:

Results indicating .08% or more by weight of alcohol in your blood shall, and the existence of a blood alcohol content or presence of drugs sufficient to render you incapable of safely driving a vehicle may, result in suspension or revocation of your license or privilege to operate a motor vehicle.

What is your response to my request that you submit to a chemical test? Response: OKAY

Did subject submit to a chemical test? YES Type of test BREATH
Test Administered by: FRED BAIRD Where? TRAFFIC OFFICE
Time: 0115 hrs Results .20 Was subject notified of results? YES
Serial No. of test machine: 94_001121

(if the subject refuses the test, read the following)

☐ The following admonition was given by me to the subject:

If you refuse the test, it will not be given, however I must warn you that if you refuse, your license or permit to drive a motor vehicle may be revoked for one year with no provision for a limited driver's license. After you have taken this test, you will be permitted to have a physician of your own choice administer a test at your own expense, in addition to the one I have requested you to submit to, so long as it does

(If the subject cl[illegible]s the right to remain silent or the righ[illegible] counsel, read the following:)

☐ The following admonition was given by me to the subject:

Your right to remain silent and your right to counsel do not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test. You do not have the right to have counsel during the test procedure. Unless you submit to the test I am requesting, I will consider that you have refused to take the test. I warn you that if you refuse to take the test, your driver's license can be revoked for one year with no provision for a limited license.

XI. CONSTITUTIONAL RIGHTS:

Was subject advised of the following rights? YES When 0125 Am
By Whom? FRED BAIRD Where? Traffic office

X 1. You have the right to remain silent.
X 2. Anything you say can and will be used against you in a court of law.
X 3. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
X 4. If you decide to answer questions now without having counsel present, you may stop answering questions at any time. Also, you may request counsel at any time during questioning.

Were the following waiver questions asked? YES

X 1. Do you understand each of these rights I have explained to you?
Response Yeah

X 2. Having these rights in mind, do you wish to talk to us now?
Response I CAN

INTERVIEW:

Were you operating a vehicle? Yeah
Where were you going? my House
What street or highway were you on? 3200 South - I DON'T KNOW
Direction of travel? To my House
Where did you start from? I was looking for my son
When? 9 o'clock What time is it now? 2 or 3 o'clock
What is today's date? August 3 Day of week? TUESDAY
(Actual time 0130 Am Date 8-4-88 Day THURSDAY
What city or county are you in now? I Don't Know
What were you doing during the last three hours? looking for my son

Have you been drinking? Yeah
What? Beer How much? 3 or 4 BEERS
Where? Bar - DOWNTOWN 4th So. and main st.
When did you have your first drink? AT my House Last drink? 7-11
Are you under the influence of an alcoholic beverage (drugs) now?
I think so - I feel good -

Are you taking tranquilizers, pills, medicines or drugs of any kind? NO
(What kind? Get sample) N/A
When did you have the last dose? N/A
Are you ill? NO
(If subject was in an accident, ask these questions:) N/A
Were you involved in an accident today?

XII. **OTHER OCCURRENCES OR FACTS:**

I ACTIVATED my overhead Emergency Lights on the suspect vehicle AT 3900 So. State St. As the driver did not stop, I placed my Spot Light on him AT 3900 So. main St. With still no movement to Stop, I ACTIVATED my SIREN AT 3900 So. WEST Temple and Suspect finally stopped AT 250 WEST 3900 South.

XIII. **ATTACHED DOCUMENTS:**

I have attached the following documents to this report:

1. ☒ Copy of citation/temporary license
2. ☒ Subject's Utah driver's license or driver's permit
3. ☐ Traffic accident report
4. ☐ Other documents (specify) _____

I hereby certify that I am a sworn Utah Peace Officer and that the information contained above in this report form and attached documents is true and correct to my knowledge and belief and that this report form was prepared in the regular course of my duties. It is my belief the subject was in violation of section 41-6-44 U.C.A. at the date, time, and place specified in this report.

Fred David 673E

Signature of Peace Officer

Law Enforcement Agency: SLCoSO

Date: 8-1-1999 Time: 0230 AM

The **original** of this form must be sent within five (5) days of the arrest of the subject to:

Driver License Division
4501 South 2700 West
P.O. Box 30560
Salt Lake City, Utah 84130-0560

ADDENDUM G

IN THE JUSTICE COURT IN AND FOR THE 2nd PRECINCT

COUNTY OF SALT LAKE STATE OF UTAH

THE STATE OF UTAH)
vs)
Gilberto Gonzales)
dob 6/4/42)
Defendant)

CERTIFIED COPY OF DOCKET ENTRY

2-1984-98A

August 17, 1988	Filed: Citation #D09076. Gilberto Gonzales charged with DUI on August 4, 1988 by Deputy Fred Baird.
	Ent'd Order:Defendant arraigned. Plead Not Guilty. Defendant assigned Legal Defender. Pre-Trial set September 27, 1988 @3:15 PM.
September 27, 1988	Ent'd Order: Pre-trial held. County Attorney, Woody Gwynn Legal Defender, Roger Scowcroft present. Unable to resolve. Motion Hearing set October 18, 1988 @8:30 AM. Legal Defender assessment fee $50.00 to be pd 9/30/88.
September 30, 1988	Paid: $50.00 Legal Defender fee on Receipt #544096.
October 18, 1989	Ent'd Order: On joint motion of County Attorney & Legal Defender, Jury was not called. Hearing held on Motions. Both attorneys are to file motions with the court as soon as possible. Set Jury Trial January 12, 1989 @8:30 A.M.
	Filed: Motion & Memorandum in Support of Defendants Motion to Instruct.
January 12, 1989	Ent'd Order: Continue Jury Trial. County Attorney has not answered defendants Motions.

STATE OF UTAH)
ss.
COUNTY OF SALT LAKE)

I, Phyllis J. Scott , Justice of the Peace, in and for the 2nd Precinct, Salt Lake County, State of Utah, do hereby certify that the above is a full and correct copy of the record of the above proceedings in the above case as it appears in the docket of my Court.

Dated May 8, 1989

Justice of the Peace

IN THE JUSTICE COURT IN AND FOR THE 2nd PRECINCT

COUNTY OF SALT LAKE STATE OF UTAH

THE STATE OF UTAH)
)
vs)
Gilberto Gonzales) CERTIFIED COPY OF DOCKET ENTRY
dob 6/4/42)
Defendant)

2-1984-98A

Cont.....

March 2, 1989	Ent'd Order: Jury was not called. Set for Change of Plea on April 25, 1989 @8:30A.M.
April 25, 1989	Ent'd Order: Defendant appeared with counsel, Roger Scowcroft and County Attorney, Woody Gwynn present. Entered into a "No Contest" plea in order to appeal within 30 days. Sentencing as follows: DUI- $480.00 + $120 Surcharge + $100 VR + $50 AR fee + 60 days in jail/57 days suspended on 1. Payment of fines & fees-to be determined after stay date. 2. DUI series to be determined after stay date. 3. Probation to court 6 months- other 3 days are suspended on 24 hours community service.
April 28, 1989	Filed: Notice of Appeal, Certificate of Probable Cause and Order to Stay Execution.
May 8, 1989	Mailed: Certified Copy of the Docket and file to Judge Floyd Gowans, Presiding Judge, Third Circuit Court, Salt Lake City, Utah

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Phyllis J. Scott, Justice of the Peace, in and for the 2nd Precinct, Salt Lake County, State of Utah, do hereby certify that the above is a full and correct copy of the record of the above proceedings in the above case as it appears in the docket of my Court.

Dated May 8, 1989

Justice of the Peace

TEXTS OF STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

(2) An ordinance adopted by a local authority that governs reckless driving, or operating a vehicle in willful or wanton disregard for the safety of persons or property shall be consistent with the provisions of this code which govern those matters.

History: C. 1953, 41-6-43, enacted by L. 1983, ch. 99, § 11; 1987, ch. 138, § 36.

Repeals and Enactments. — Laws 1978, ch. 33, § 54 repealed old § 41-6-43 (L. 1941, ch. 52, § 33; C. 1943, 57-7-110; L. 1957, ch. 75, § 1; 1967, ch. 88, § 1; 1969, ch. 107, § 1), relating to powers of local authorities as to driving while intoxicated and reckless driving, and a new § 41-6-43 was enacted by Laws 1979, ch. 242, § 12.

Laws 1983, ch. 99, § 11 repealed former § 41-6-43 (L. 1979, ch. 242, § 12), relating to powers of local authorities, and enacted present § 41-6-43.

Amendment Notes. — The 1987 amendment substituted "operating" for "driving" both places it appears in this section and made minor changes in punctuation.

Cross-References. — Traffic regulations, powers and duties of cities as to, § 10-8-30.

NOTES TO DECISIONS

ANALYSIS

Effect of interim repeal.
Powers of cities.

Effect of interim repeal.

The interim repeal of this section did not render municipalities without authority to enact ordinances prohibiting driving under the influence of alcohol as municipalities had authority under their general police powers to enact such ordinances in the absence of a specific legislative grant of authority. Layton City v. Glines, 616 P.2d 588 (Utah 1980).

Powers of cities.

City held to have power to pass ordinance prohibiting driving while intoxicated, notwithstanding statute on the subject. Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938).

COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 296 et seq.

C.J.S. — 61A C.J.S. Motor Vehicles §§ 625 to 637.

Key Numbers. — Automobiles ⇐ 332.

41-6-43.10. Repealed.

Repeals. — Section 41-6-43.10 (L. 1955, ch. 71, § 1; 1957, ch. 78, § 2; 1983, ch. 99, § 12), relating to negligent homicide, was repealed by Laws 1985 (1st S.S.), ch. 1, § 2.

41-6-44. Driving under the influence of alcohol or drug or with specified or unsafe blood alcohol concentration — Measurement of blood or breath alcohol — Criminal punishment — Arrest without warrant — Penalties — Suspension or revocation of license.

(1) (a) It is unlawful and punishable as provided in this section for any person to operate or be in actual physical control of a vehicle within this state if the person has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test given within two hours

after the alleged operation or physical control, or if the person is under the influence of alcohol or any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely operating a vehicle.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(2) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) Every person who is convicted the first time of a violation of Subsection (1) is guilty of a class B misdemeanor. But if the person has inflicted a bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner, he is guilty of a class A misdemeanor.

(b) In this section, the standard of negligence is that of simple negligence, the failure to exercise that degree of care which an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(4) In addition to any penalties imposed under Subsection (3), the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours nor more than 240 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 24 hours nor more than 50 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(5) (a) Upon a second conviction within five years after a first conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1), the court shall, in addition to any penalties imposed under Subsection (3), impose a mandatory jail sentence of not less than 240 consecutive hours nor more than 720 hours, with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 80 hours nor more than 240 hours and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility. The court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility.

(b) Upon a subsequent conviction within five years after a second conviction under this section or under a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1), the court shall, in addition to any penalties imposed under Subsection (3), impose a mandatory jail sentence of not less than 720 nor more than 2,160 hours with emphasis on serving in the drunk tank of the jail, or require the person to work in a community-service work program for not less than 240 nor more than 720 hours and, in addition to the jail sentence or work in the community-service work program, order the person to obtain treatment at an alcohol rehabilitation facility.

(c) No portion of any sentence imposed under Subsection (3) may be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation

or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with Subsection 41-6-43(1) may not be terminated and the department may not reinstate any license suspended or revoked as a result of the conviction, if it is a second or subsequent conviction within five years, until the convicted person has furnished evidence satisfactory to the department that all fines and fees, including fees for restitution and rehabilitation costs, assessed against the person, have been paid.

(6) (a) The provisions in Subsections (4) and (5) that require a sentencing court to order a convicted person to: participate in an assessment and educational series at a licensed alcohol rehabilitation facility; obtain, in the discretion of the court, treatment at an alcohol rehabilitation facility; or obtain, mandatorily, treatment at an alcohol rehabilitation facility; or do any combination of those things, apply to a conviction for a violation of Section 41-6-45 that qualifies as a prior offense under Subsection (7). The court is required to render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under Section 41-6-45 that qualifies as a prior offense under Subsection (7), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections 41-6-44(4) and (5).

(b) For purposes of determining whether a conviction under Section 41-6-45 which qualified as a prior conviction under Subsection (7), is a first, second, or subsequent conviction under this subsection, a previous conviction under either this section or Section 41-6-45 is considered a prior conviction.

(c) Any alcohol rehabilitation program and any community-based or other education program provided for in this section shall be approved by the Department of Social Services.

(7) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45 or of an ordinance enacted under Subsection 41-6-43(1) in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement is an offer of proof of the facts which shows whether there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The court shall advise the defendant before accepting the plea offered under this subsection of the consequences of a violation of Section 41-6-45 as follows. If the court accepts the defendant's plea of guilty or no contest to a charge of violating Section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction is a prior offense for the purposes of Subsection (5).

(c) The court shall notify the department of each conviction of Section 41-6-45 which is a prior offense for the purposes of Subsection (5).

(8) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has

occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(9) The Department of Public Safety shall suspend for 90 days the operator's license of any person convicted for the first time under Subsection (1), and shall revoke for one year the license of any person convicted of any subsequent offense under Subsection (1) if the violation is committed within a period of five years from the date of the prior violation. The department shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 41-2-130, if the previous suspension was based on the same occurrence upon which the record of conviction is based.

History: L. 1941, ch. 52, § 34; C. 1943, 57-7-111; L. 1949, ch. 65, § 1; 1957, ch. 75, § 1; 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1; 1981, ch. 63, § 2; 1982, ch. 46, § 1; 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33; 1985, ch. 46, § 1; 1986, ch. 122, § 1; 1986, ch. 178, § 29; 1987, ch. 138, § 37; 1987 (1st S.S.), ch. 8, § 2; 1988, ch. 17, § 1.

Amendment Notes. — The 1985 amendment divided Subsection (3) into Subsections (3)(a) and (3)(b); deleted "of this section" before "shall be punished" in the first sentence of Subsection (3)(a); divided the former first sentence of Subsection (3)(a) into the first and second sentences, substituting "But" for "except that" at the beginning of the second sentence of Subsection (3)(a); divided Subsection (5) into Subsections (5)(a) through (5)(c); divided the former first sentence of Subsection (5)(a) into the first and second sentences; substituted "may" for "shall" in three places in Subsection (5)(c); deleted "such time as" after "probation until" in the first sentence of Subsection (5)(c); deleted "and unless" before "the convicted person" near the end of Subsection (5)(c); divided Subsection (6) into Subsections (6)(a) and (6)(b); deleted "of this section" at the end of Subsections (7)(b) and (7)(c); substituted "the officer has probable cause to believe the violation has occurred" for "the violation is coupled with an accident or collision in which the person is involved and when the violation has, in fact, been committed" in Subsection (8); substituted "probable" for "reasonable" near the end of Subsection (8); deleted "a period of" before "90 days" and "of this section" before "and shall revoke" in Subsection (9); and made minor changes in phraseology, punctuation, and style.

The 1986 amendment by Laws 1986, ch. 122, in Subsection (4) deleted "for" following "provided" and substituted "240 hours" for "ten days", "24 hours" for "two" and "80 hours" for "ten days"; in Subsection (5)(a) substituted "240" for "48", "720 hours" for "ten days", "80 hours" for "ten", and "240 hours" for "30 days"; and in Subsection (5)(b) substituted "720" for "30", "2,160 hours" for "90 days", "240" for "30", and "720 hours" for "90 days".

The 1986 amendment by Laws 1986, ch. 178, in Subsection (3)(a), substituted the language beginning "is guilty of a class B misdemeanor" for "shall be punished by imprisonment for not less than 60 days nor more than six months, or by a fine of $299, or by both the fine and imprisonment" in the first sentence and the language beginning "is guilty of a class A misdemeanor" for "shall be punished by imprisonment in the county jail for not more than one year, and, in the discretion of the court, by a fine of not more than $1,000" in the second sentence.

The 1987 amendment designated the previously undesignated provisions of Subsection (1) as last amended by Laws 1986, ch. 178, § 29 and rewrote the provisions of Subsection (a) to the extent that a detailed analysis is impracticable; in Subsection (2) added the phrase following "centimeters of blood"; in Subsection (3)(a) deleted "imprisonment shall be for not fewer than 60 days" following "misdemeanor" in the first sentence and deleted "any imprisonment in the county jail shall be for not more than one year" at the end of the second sentence; in Subsection (6)(b) deleted "41-6-44 or"; in Subsection (7)(a) substituted "41-6-43(1)" for "41-6-43(b)"; in Subsection (9) substituted "41-2-130" for "41-2-19.6"; and made minor changes in phraseology and punctuation throughout the section.

This section was set out in 1987 as reconciled by the Office of Legislative Research and General Counsel.

The 1987 (1st S.S.) amendment, effective June 5, 1987, substituted "concentration of .08 grams or greater as shown by a chemical test" for "content of .08% or greater by weight as shown by a chemical test" in Subsection (1) (a), substituted the provisions of Subsection (2) for the former provisions which read "Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood, and the percent by weight of alcohol in the breath shall be based upon grams of alcohol per 210 liters of breath", and

76-2-302. Compulsion.—(1) A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.

(2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

(3) A married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion or to any defense of compulsion except as in subsection (1) provided.

History: C. 1953, 76-2-302, enacted by L. 1973, ch. 196, § 76-2-302.

Collateral References.

Criminal Law⇐38.

22 C.J.S. Criminal Law § 44.

21 Am. Jur. 2d 180, Criminal Law §§ 100, 101.

DECISIONS UNDER FORMER LAW

Coercion.

Where defendant was charged with escape from state prison, trial court did not err in refusing to submit to jury asserted defense of coercion where defendant admitted his escape but claimed he did so because of trouble with the prison inmates caused by his failure to pay for broken radio. State v. Pearson, 15 U. (2d) 353, 393 P. 2d 390.

Where wife was asked by imprisoned husband to break into jail and get the keys and unlock the doors, but instead gave him hacksaw blades, she was not incapable of commission of crime because she departed from his coercion and committed a crime of her own choosing. Farrell v. Turner, 25 U. (2d) 351, 482 P. 2d 117.

76-2-303. Entrapment.—(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(2) The defense of entrapment shall be unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening the injury to a person other than the person perpetrating the entrapment.

(3) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

(5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the de-

76-2-308. Affirmative defenses.—Defenses enumerated in this part constitute affirmative defenses.

History: C. 1953, 76-2-308, enacted by L. 1973, ch. 196, § 76-2-308.

Collateral References.

Criminal Law⇐330.
22A C.J.S. Criminal Law § 573.
21 Am. Jur. 2d 204, Criminal Law § 135.

Part 4

Justification Excluding Criminal Responsibility

76-2-401. Justification as defense—When allowed.—Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:

(1) When the actor's conduct is in defense of persons or property under the circumstances described in sections 76-2-402 through 76-2-406 of this part;

(2) When the actor's conduct is reasonable and in fulfillment of his duties as a governmental officer or employee;

(3) When the actor's conduct is reasonable discipline of minors by parents, guardians, teachers, or other persons in loco parentis;

(4) When the actor's conduct is reasonable discipline of persons in custody under the laws of the state;

(5) When the actor's conduct is justified for any other reason under the laws of this state.

History: C. 1953, 76-2-401, enacted by L. 1973, ch. 196, § 76-2-401.

Cross-References.

Burden of proving homicide justified, 77-31-12.

Collateral References.

Criminal Law⇐38.
22 C.J.S. Criminal Law § 49.
40 Am. Jur. 2d 405, Homicide § 110.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 A. L. R. 380.

Duty to retreat to wall as affected by illegal character of premises on which homicide occurs, 2 A. L. R. 518.

Homicide: duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 A. L. R. 3d 584.

Homicide: duty to retreat where assailant and assailed share the same living quarters, 26 A. L. R. 3d 1296.

Homicide: modern status of rules as to burden and quantum of proof to show self-defense, 43 A. L. R. 3d 221.

Homicide or assault in defense of habitation or property, 34 A. L. R. 1488.

Humanitarian motives, homicide as affected by, 25 A. L. R. 1007.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense, 9 A. L. R. 3d 933.

Self-defense by one who has rightfully entered on premises of his assailant, 53 A. L. R. 486.

Self-defense, right of, as affected by defendant's violation of law only casually related to the encounter, 10 A. L. R. 861.

Wife's confession of adultery as affecting degree of homicide in killing her paramour, 10 A. L. R. 470.

DECISIONS UNDER FORMER LAW

Combat.

Combat, within meaning of former excusable homicide statute, required actual participation by both deceased and defendant, and did not include one-sided attack on innocent victim. State v. Johnson, 112 U. 130, 185 P. 2d 738.

Guiding principle in determining whether homicide was committed by accident and misfortune in heat of passion and upon

History: C. 1953, 76-3-404, enacted by L. 1973, ch. 196, § 76-3-404.

Collateral References.

Criminal Law⇐1208(2).

24B C.J.S. Criminal Law § 1983(2)b (a).

21 Am. Jur. 2d 547, Criminal Law § 584.

Defendant's right to disclosure of presentence report, 40 A. L. R. 3d 681.

76-3-405. Limitation on sentence where conviction or prior sentence set aside.—Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied.

History: C. 1953, 76-3-405, enacted by L. 1973, ch. 196, § 76-3-405.

Collateral References.

Criminal Law⇐260(13).

22 C.J.S. Criminal Law § 403(9).

Propriety of increased punishment on new trial for same offense, 12 A. L. R. 3d 978.

CHAPTER 4

INCHOATE OFFENSES

Part 1. Attempt

Part 2. Criminal Conspiracy

Part 3. Exemptions and Restrictions

Part 1

Attempt

76-4-101. Attempt—Elements of offense.—(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

(3) No defense to the offense of attempt shall arise:

(a) Because the offense attempted was actually committed; or

(b) Due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of adjudicative proceedings of agencies of political subdivisions of the state or other local agencies;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs involving a criminal conviction, except those involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including but not limited to divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals, upon its own motion only and by the vote of four judges of the court, may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8.

Amendment Notes. — The 1988 amendment by Laws 1988, Chapter 73, effective April 25, 1988, inserted subsection designations (a) and (b) in Subsection (1); inserted "resulting from formal adjudicative proceedings" in Subsection (2)(a); substituted "state agencies" for "state and local agencies" in Subsection (2)(a); substituted "informal adjudicative proceedings of the agencies" for "them" in Subsection (2)(a); deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted Subsection (b); redesignated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); added "except those from the small claims department of a circuit court" at the end of Subsection (2)(d); and made minor stylistic changes.

The 1988 amendment by Laws 1988, Chapter 210, effective April 25, 1988, added Subsection (2)(h) and redesignated former Subsection (2)(h) as Subsection (2)(i).

The 1988 amendment by Laws 1988, Chapter 248, effective April 25, 1988, in Subsection (2)(a), rewrote the phrase before "except" which had read "the final orders and decrees of state and local agencies or appeals from the district court review of them"; deleted "notwithstanding any other provision of law" at the end of Subsection (2)(a); inserted present Subsection (2)(b); designated former Subsections (2)(b) to (2)(h) as Subsections (2)(c) to (2)(i); and substituted "first degree or capital felony" for "first or capital degree felony" in present Subsection (2)(f).

78-4-5. Jurisdiction — Exclusive and concurrent.

(1) Circuit courts shall have jurisdiction over all classes of misdemeanors and infractions involving persons 18 years of age and older and shall have the power to impose the punishments prescribed for these offenses. The judge of the circuit court shall have and exercise the powers and jurisdiction of a magistrate, including proceedings for the preliminary examination to determine probable cause, commitment prior to trial, or the release on bail of persons charged with criminal offenses. Whenever a complaint may be commenced before a magistrate under § 77-57-2 or an arrested person is to be taken before a magistrate under § 77-13-17, the complaint may be commenced or the arrested person may be taken before any circuit court judge in the county or the justice of the peace in the county in whose precinct the offense occurred, unless both are unavailable, and then before any justice of the peace having jurisdiction. All complaints for offenses charged under Title 41, except for offenses charged under Article 5 of Chapter 6 of Title 41, must be filed in the court of the municipal justice of the peace or the precinct of the county justice of the peace where the offense occurred where such justice courts exist and have jurisdiction of such offenses.

(2) The circuit court shall have exclusive original jurisdiction of all cases arising under or by reason of the violation of any county ordinance involving persons 18 years of age or older, unless the office of precinct justice of the peace exists in the county, in which case jurisdiction shall be concurrent.

(3) The circuit court shall have exclusive original jurisdiction of all cases arising under or by reason of the violation of any municipal ordinance involving persons 18 years of age and over in those municipalities in which a municipal department of the circuit court exists or has been created.

(4) The circuit court shall have concurrent jurisdiction with the juvenile court over all traffic offenses committed by persons less than 18 years of age.

History: C. 1953, 78-4-5, enacted by L. 1977, ch. 77, § 1.

Repeals and Enactments. — Laws 1977, ch. 77, § 1 repealed former § 78-4-5 (L. 1951, ch. 26, § 2(2); C. 1943, Supp., 104-4-3.11), relating to prohibition of political activity, and enacted present § 78-4-5, effective July 1, 1978.

Compiler's Notes. — Sections 77-57-2 and 77-13-17, referred to the third sentence in Subsection (1), were repealed by Laws 1980, ch. 15, § 1. For present provisions, see §§ 77-25-1 et seq. and 77-7-1 et seq.

Cross-References. — Actions for violation of ordinances, § 10-7-65 et seq.

Justices' courts, Chapter 5 of this title.

Magistrates, § 77-7-18 et seq.

Power of cities to provide by ordinance for treatment of alcoholics and narcotic or drug addicts, § 10-8-47.

NOTES TO DECISIONS

ANALYSIS

78-4-5. Jurisdiction — Exclusive and concurrent — Taking of juvenile licenses.

(1) (a) Circuit courts have jurisdiction over all classes of misdemeanors and infractions involving persons 18 years of age and older and may impose the punishments prescribed for these offenses. The judge of the circuit court has the authority and jurisdiction of a magistrate including the conducting of proceedings for the preliminary examination to determine probable cause, commitment prior to trial, or the release on bail of persons charged with criminal offenses.

(b) When a complaint may be commenced before a magistrate under Section 77-3-1 or an arrested person is to be taken before a magistrate under Section 77-7-18, the complaint may be commenced or the arrested person may be taken before any circuit court judge in the county or the justice court judge in the county in whose precinct the offense occurred, unless both are unavailable; then before any justice court judge having jurisdiction.

(c) All complaints for offenses charged under Title 41 except offenses charged under Article 5, Chapter 6, Title 41, shall be filed in the municipal justice court or the county justice court where the offense occurred if those justice courts exist and have jurisdiction of the offenses.

(2) The circuit court has exclusive original jurisdiction of all cases arising under or by reason of the violation of any county ordinance involving persons 18 years of age or older, but if a county justice court exists in the county, jurisdiction is concurrent.

(3) (a) The circuit court has exclusive original jurisdiction of all cases arising under or by reason of the violation of any municipal ordinance involving persons 18 years of age and older in those municipalities in which a municipal department of the circuit court exists or has been created.

(b) The circuit court has concurrent jurisdiction with county justice courts over violations of municipal ordinances charging persons 18 years of age and older with driving under the influence of alcohol or drugs, driving with a blood alcohol content of .08% or higher, or reckless driving in municipalities within a county precinct in which a municipal justice court does not exist.

(c) The circuit court has concurrent jurisdiction with municipal justice courts over violations of state statutes in municipalities where a municipal justice court exists.

(4) The circuit court has jurisdiction over all traffic offenses committed by persons younger than 18 years of age, except those offenses exclusive to the juvenile court under Subsection 78-3a-16(1)(a). The circuit court shall notify the juvenile court of a conviction of any person younger than 18 years of age of an offense under Section 78-3a-39.5.

(5) The circuit court has authority to take the juvenile's driver license and return it to the Driver License Division, Department of Public Safety, for suspension under Section 41-2-128.

History: C. 1953, 78-4-5, enacted by L. 1977, ch. 77, § 1; 1988, ch. 248, § 29; 1989, ch. 150, § 5; 1989, ch. 157, § 9; 1989, ch. 188, § 8.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, divided Subsection (1) into subsections; substituted "Section 77-3-1" and "Section 77-7-18" for "Section

(3) in actions under the Utah Uniform Probate Code;

(4) in actions to review the decisions of any state administrative agency, board, council, commission, or hearing officer;

(5) in actions seeking remedies in the form of extraordinary writs; and

(6) in all other actions where, by statute, jurisdiction is exclusively vested in the district court or other trial or appellate court.

History: C. 1953, 78-4-7, enacted by L. 1977, ch. 77, § 1; 1983, ch. 76, § 1; 1986, ch. 121, § 1; 1988, ch. 248, § 31.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted Subsection designation (1) at the beginning of the section; substituted the subsection designations (1) to (6) for former subsection designations (1)(a) to (1)(f); deleted former Subsection (2) which read "The circuit court shall have concurrent jurisdiction with justices of the peace courts where the sum claimed is less than $750"; and made minor stylistic changes.

NOTES TO DECISIONS

Title to real estate.

An order of the circuit court purporting to adjudicate ownership rights to real property and the proceeds of its sale was null and void. A circuit court could not, through consent or waiver, expand its jurisdiction to adjudicate claims involving the title to real property. Thompson v. Jackson, 743 P.2d 1230 (Utah Ct. App. 1987).

78-4-7.5. Trials de novo.

The circuit court has appellate jurisdiction to hear trials de novo of the judgments of the justices' courts and trials de novo of the small claims department of the circuit court.

History: C. 1953, 78-4-7.5, enacted by L. 1986, ch. 47, § 66; 1988, ch. 73, § 2; 1988, ch. 248, § 32.

Amendment Notes. — The 1988 amendment by Laws 1988, Chapter 73, effective April 25, 1988, rewrote the section which read "The circuit court has jurisdiction to hear trials de novo of the judgments of the justices' courts."

The 1988 amendment by Laws 1988, Chapter 248, effective April 25, 1988, inserted "appellate" before "jurisdiction."

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

78-4-8. Venue and change of judge provisions — Exceptions.

Provisions of law regarding venue and change of judge apply to the circuit courts the same as district courts, except cases arising under or by reason of the violation of municipal ordinances may, upon stipulation of the parties or upon order of the court for good cause shown, be tried and decided in a municipality or county within the circuit other than the municipality or county in which the violation occurred.

History: C. 1953, 78-4-8, enacted by L. 1977, ch. 77, § 1; 1983, ch. 76, § 2; 1988, ch. 248, § 33.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, deleted the former first sentence which read "In criminal and civil cases the territorial jurisdiction of circuit courts shall be statewide" and made minor stylistic changes.

History: C. 1953, 78-4-10, enacted by L. 1977, ch. 77, § 1; L. 1983, ch. 76, § 4; 1986, ch. 47, § 67.

Repeals and Enactments. — Laws 1977, ch. 77, § 1 repealed former § 78-4-10 (L. 1951, ch. 58, § 1; C. 1943, Supp., 104-4-7), relating to residence of city court judges and place of holding court, and enacted present § 78-4-10, effective July 1, 1978.

Amendment Notes. — The 1983 amendment increased the number of judges from 11 to 14 in the fifth circuit and from four to five in the eighth circuit; and added the last sentence.

The 1986 amendment deleted the former last sentence, which read: "The governor shall appoint three judges for the fifth circuit and one judge for the eighth circuit effective July 1, 1983, to hold office until their successors are duly elected and qualified at the general election in 1986."

78-4-11. Appeal to Court of Appeals — County attorneys to represent state, city attorneys to represent municipalities.

Except as otherwise directed by § 78-2-2, appeals from final civil and criminal judgments of the circuit courts are to the Court of Appeals. The county attorney shall represent the interests of the state as public prosecutor in any criminal appeals from the circuit court. City attorneys shall represent the interests of municipalities in any appeals from circuit courts involving violations of municipal ordinances.

History: C. 1953, 78-4-11, enacted by L. 1977, ch. 77, § 1; L. 1981, ch. 90, § 8; 1983, ch. 76, § 5; 1986, ch. 47, § 68.

Repeals and Enactments. — Laws 1977, ch. 77, § 1 repealed former § 78-4-11 (L. 1951, ch. 58, § 1; C. 1943, Supp., 104-4-8), relating to absence of city court judge and filling vacancy, and enacted present § 78-4-11, effective July 1, 1978.

Amendment Notes. — The 1986 amendment rewrote this section.

Cross-References. — Appellate jurisdiction, Utah Const., Art. VIII, Sec. 5; § 78-3-4.

City attorney, § 10-3-928.

County attorney, Chapter 18 of Title 17.

NOTES TO DECISIONS

ANALYSIS

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am Jur 2d Justices of the Peace § 58

C.J.S. — 51 C.J S Justices of the Peace § 67.

Key Numbers. — Justices of the Peace ⇐ 79

78-5-4. Concurrent criminal jurisdiction.

Justices' courts have concurrent jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

(1) all class B and class C misdemeanors punishable by a fine no greater than the maximum fine for a class B or C misdemeanor under § 76-3-301, or by imprisonment in the county jail or municipal prison not exceeding six months, or by both the fine and imprisonment; and

(2) all infractions and the punishments prescribed for them.

History: C. 1953, 78-5-4, enacted by L. 1979, ch. 127, § 5; 1986, ch. 178, § 65.

Repeals and Enactments. — Laws 1979, ch 127, § 5 repealed former § 78-5-4 (L 1951, ch 58, § 1, C 1943, Supp , 104-5-4, L 1975 (1st S S.), ch. 4, § 1, 1977, ch. 78, § 12), relating to criminal jurisdiction of justices' courts, and enacted present § 78-5-4

Amendment Notes. — The 1986 amendment, in Subsection (1), substituted "no greater than the maximum fine for a class B or C misdemeanor under § 76-3-301" for "less than $300" and "the" for "such" preceding "fine and imprisonment"

Cross-References. — Abuse of process a misdemeanor, § 76-8-601

Institutions of higher learning, violation of regulations, § 53-45-9

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Laws 1925, ch 62, amending former § 20-5-4 (Code 1943) and limiting jurisdiction of justices' courts to offenses committed in their respective precincts, was not invalid because it might produce confusion and derangement in criminal practice and procedure in justices' courts and was inconsistent with other statutory provisions Dillard v District Court, 69 Utah 10, 251 P 1070 (1926)

Failure to pay fine.

After justice of peace sentenced defendant to jail for petit larceny, and to pay fine, he was without authority to adjudge that defendant be further imprisoned in default of payment of fine imposed In re Lewis, 10 Utah 47, 41 P 1077 (1894)

Nonindictable misdemeanor.

—Waiver of venue.

Although complaint charging the injuring of a cow by altering or defacing brand should have been filed in justices' court instead of in district court, since action was for nonindictable misdemeanor, question of venue was not raised by motion in arrest of judgment based on failure of jurisdiction, as district court had cognizance of subject of misdemeanors, and as question of venue was not raised, it was

78-5-13. Judgment not a lien unless so docketed.

A judgment rendered in a justices' court creates no lien upon any lands of the judgment debtor, unless such an abstract is filed and docketed in the office of the clerk of the district court of the county in which the lands are situated; and when so filed and docketed such judgment is a lien upon the real property of the judgment debtor, not exempt from execution, situated in that county, for the period of eight years from the date the judgment was entered, unless the judgment is previously satisfied.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-5-13.

Cross-References. — Lien of judgments of district courts, § 78-22-1.

Limitation of action on judgment, § 78-12-22

Satisfaction of judgments in district courts, Rule 58B, U R C P

NOTES TO DECISIONS

Priority of liens.

Where judgment rendered by justice of peace became lien upon land by being duly docketed in district court, but before it was enforced by levy and sale, mortgage lien also accrued and thereafter time limited by statute for lien of such judgment was allowed to expire, and judgment was then renewed, lien of first judgment expired, mortgage lien attached as first lien, and sale on second judgment could not affect such mortgage lien Smith v Schwartz, 21 Utah 126, 60 P 305, 81 Am St R 670 (1899)

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Justices of the Peace § 93

C.J.S. — 51 C J.S. Justices of the Peace § 123(7)

Key Numbers. — Justices of the Peace ⇐ 131, 138(10)

78-5-14. Trial de novo in circuit court.

Any person dissatisfied with a judgment rendered in a justices' court, whether the same was rendered on default or after trial, is entitled to a trial de novo in the circuit court of the county as provided by law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-5-14; 1986, ch. 47, § 74.

Amendment Notes. — The 1986 amendment substituted "is entitled to a trial de novo with the circuit court of the county as provided by law" for "may apply for a new trial or appeal therefrom to the district court of the county within the time and in the manner provided by law"

Cross-References. — Fee of county clerk on appeal to district court, § 21-2-2

Jurisdiction of circuit court, § 78-4-7 5

NOTES TO DECISIONS

ANALYSIS

Appealable judgments
—Finality
Jurisdiction of appellate court
—Amount in controversy
—Lack of jurisdiction of justices
——Effect
—Waiver of objections
——Consenting that case be set for trial

78-31a-20. Scope of chapter.

This chapter is not intended to provide a means of arbitration exclusive of those sanctioned under common law.

History: C. 1953, 78-31a-20, enacted by L. 1985, ch. 225, § 1.

CHAPTER 32
CONTEMPT

78-32-1. Acts and omissions constituting contempt.

The following acts or omissions in respect to a court or proceedings therein are contempts of the authority of the court:

(1) Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

(2) Breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

(3) Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, or other person appointed or elected to perform a judicial or ministerial service.

(4) Deceit, or abuse of the process or proceedings of the court, by a party to an action or special proceeding.

(5) Disobedience of any lawful judgment, order or process of the court.

(6) Assuming to be an officer, attorney or counselor of a court, and acting as such without authority.

(7) Rescuing any person or property in the custody of an officer by virtue of an order or process of such court.

(8) Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial.

(9) Any other unlawful interference with the process or proceedings of a court.

(10) Disobedience of a subpoena duly served, or refusing to be sworn or to answer as a witness.

(11) When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, concerning the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

(12) Disobedience by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-32-1.

Cross-References. — Abuse of office, § 76-8-201 et seq

Criminal Code not to affect contempt power, §§ 76-1-107, 76-3-201

Defense costs in criminal actions, contempt based on failure of convicted defendant to pay, §§ 77-32a-7 to 77-32a-12

Discovery, sanctions for noncompliance with order compelling discovery, Rule 37(b)(D), U.R.C P

Execution sale bidder, refusal to pay sum bid, Rule 69(e)(4), U R.C P

Judgment directing performance of specific act, Rule 70, U R C P

Juvenile courts, §§ 78-3a-28, 78-3a-52

Labor disputes, §§ 34-19-9, 34-19-10

Masters, refusal of witness to appear or give evidence before, Rule 53(d)(2), U R C P

Penalties for failure to appear or complete jury service, § 76-46-20

Power of judicial officers to punish for contempt, § 78-7-18

Practice of law without a license, § 78-51-25

Repeated application for orders as contempt, § 78-7-20

Subpoena, refusal to obey, Rule 45(f), U R C P

Summary judgment affidavits made in bad faith, Rule 56(g), U R C P

NOTES TO DECISIONS

Analysis

Ability to comply.

It is important that the ability of the party charged with contempt to perform receive consideration before the court is justified in awarding damages Foreman v Foreman, 111 Utah 72, 176 P 2d 144 (1946)

One who puts forth every reasonable effort to comply with court order, but is unable to do so, is not guilty of contempt on account of such failure Limb v Limb, 113 Utah 385, 195 P 2d 263 (1948)

Judgment finding defendant in contempt for failure to comply with divorce decree, requiring payment of $75 per month for alimony and support of minor children, was upheld as supported by evidence that defendant was able to comply with that decree and that his failure to do so was willful, even though defendant testified that he had been sick and out of employment and that, since starting work again, he had paid divorced wife $50 a month out of monthly salary of $180, from which he also

Rule 4.3. Continuances — Civil.

(a) Cases set for trial shall not be continued upon stipulation of counsel alone, but continuances may be allowed by order of the presiding judge or the judge to whom the case is assigned for trial. No continuances shall be allowed except for good cause shown. Said continuances may be granted upon motion of counsel made in open court or by written motion in which the grounds therefore are stated or by written stipulation of the parties and approval of the court. A notice of all written motions must be served upon counsel for the opposing side in the manner prescribed by the Utah Rules of Civil Procedure and these rules. In the event that counsel seeks to have the hearing of the same in less than five (5) days from the time of the service of the motion, an order permitting the same and directing that the notice be served, must be entered by the court and served upon counsel with the motion.

(b) In law and motion matters, except orders to show cause and bench warrants, continuances may be had upon stipulation of the parties and notice to the law and motion clerks provided, however, that once a matter has been placed upon the typed law and motion calendar, a continuance may be had only upon approval by the court.

Rule 4.4. Requests for instructions.

(a) Requests for instruction shall be presented to the court at the commencement of the trial, provided, that additional or further instructions may be presented no later than the close of evidence. At the time of presenting requests, a copy of the same shall be furnished to opposing counsel.

(b) Requests for instructions to the jury must be in writing, stating in full the instruction requested. Requests referring only to numbers in JIFU will not be received. Each request shall be upon a separate sheet of paper, the original and copies of which shall be free from red lines and firm names, and shall be entitled:

"Instruction No. "

with the number of the request written thereon in lead pencil.

(c) If citations are given in support of a requested instruction, at least one copy of the requested instruction furnished to the court shall be submitted without such citation being typed thereon. Citations may be set out upon separate sheets attached to the particular instruction to which the citation relates.

Rule 4.5. Orders, judgments, and decrees.

(a) **Contents and service.** Upon entry of judgment, notice of such entry of judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All orders, judgments, and decrees shall be so drawn as to show that the same were made and entered upon the stipulation of counsel or the motion of an attorney of record in the cause or proceeding in which the same is made, and shall give the name of the attorney making such motion, or that the same was ordered by the court on its own initiative.

COLLATERAL REFERENCES

Utah Law Review. — Child Sexual Abuse Cases, 1986 Utah L. Rev. 443.

Victims Have Rights Too, 1986 Utah L. Rev. 449.

Note, Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?, 1986 Utah L. Rev. 461.

A.L.R. — Closed-circuit television witness examination, 61 A.L.R.4th 1155.

Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(1) relevant written or recorded statements of the defendant or codefendants;

(2) the criminal record of the defendant;

(3) physical evidence seized from the defendant or codefendant;

(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Subject to constitutional limitations, the accused may be required to:
(1) appear in a lineup;
(2) speak for identification;
(3) submit to fingerprinting or the making of other bodily impressions;
(4) pose for photographs not involving reenactment of the crime;
(5) try on articles of clothing or other items of disguise;
(6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;
(7) provide specimens of handwriting;
(8) submit to reasonable physical or medical inspection of his body; and
(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and his counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.

(77-35-16, enacted by L. 1980, ch. 14, § 1.)

NOTES TO DECISIONS

Analysis

In general.

Discovery powers are conferred upon both the circuit courts and the district courts State v Easthope, 668 P.2d 528 (Utah 1983).

Continuing duty to disclose.

Even if there is no court-ordered disclosure, a prosecutor's failure to disclose newly discovered inculpatory information which falls within the ambit of Subdivision (a), after the prosecution has made a voluntary disclosure of evidence, might so mislead a defendant as to cause prejudicial error State v Carter, 707 P 2d 656 (Utah 1985); State v Knight, 734 P 2d 913 (Utah 1987).

Discretion of court.

A trial court is allowed broad discretion in granting or refusing discovery and inspection, and its determinations on this subject will not be overturned on appeal unless the court has abused its discretion State v Knill, 656 P 2d 1026 (Utah 1982), State v Lairby, 699 P 2d 1187 (Utah 1984)

Failure to request discovery.

The defendant's claim that the prosecutor's failure to provide him with a police report describing a witness' testimony prior to trial was not entertained, no request for discovery, written or oral, being made at any time State v Booker, 709 P 2d 342 (Utah 1985)

Nondisclosure.

—No violation of rule.

State's failure to disclose to defendant before trial certain jail records which corroborated defendant's testimony that he requested medical treatment while in jail did not violate defendant's discovery rights where there was no showing in record from which it could be fairly inferred that prosecution knew or should have known that defendant's request for medical treatment would ever be an issue or of any importance at trial State v Fierst, 692 P 2d 751 (Utah 1984)

tion in trial of criminal case (or related hearing) as ground of disqualification in subsequent criminal case involving same defendant, 6 A L R 3d 519

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror, 11 A L R 3d 859

Number of peremptory challenges allowed in criminal case where there are two or more defendants tried together, 21 A L R 3d 725

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury, 24 A L R 3d 1236

Comment note on beliefs regarding capital punishment as disqualifying juror in capital case — post-Witherspoon cases, 39 A L R 3d 550

Propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions, 43 A L R 3d 1081

Membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge, 63 A L R 3d 1052

Similarity of occupation between proposed juror and alleged victim of crime as affecting *juror's competency*, 71 A L R 3d 974

Law enforcement officers as qualified jurors in criminal cases, 72 A L R 3d 895

Former law enforcement officers as qualified jurors in criminal cases, 72 A L R 3d 958

Use of peremptory challenge to exclude from jury persons belonging to race or class, 79 A L R 3d 14

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, 86 A L R 3d 571

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case, 94 A L R 3d 15

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire, 95 A L R 3d 172

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case as ground of complaint by accused, 99 A L R 3d 1261

Additional peremptory challenges because of multiple criminal charges, 5 A L R 4th 533

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment, 8 A L R 4th 149

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt, 50 A L R 4th 969

Professional or business relations between proposed juror and attorney as ground for challenge for cause, *52 A L R 4th 964*

Fact that juror in criminal case or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification, 65 A L R 4th 743

Examination and challenge of federal case jurors on basis of attitudes toward homosexuality, 85 A L R Fed 864

Key Numbers. — Jury ⇐ 57 et seq

Rule 19. Instructions.

(a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request At the same time copies of such requests shall be furnished to the other parties The court shall inform counsel of its proposed action upon the request, and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement

(b) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

(77-35-19, enacted by L. 1980, ch. 14, § 1.)

NOTES TO DECISIONS

ANALYSIS

Failure to request or object.

Where a defendant does not request an instruction on a certain subject, he cannot later claim that the trial court's failure to instruct on that subject is error. State v. Cowan, 26 Utah 2d 410, 490 P.2d 890 (1971).

Except when necessary to avoid manifest injustice, this rule prohibits the assigning as error the trial court's failure to give a jury instruction where no objection is made before the jury is instructed. State v. Malmrose, 649 P.2d 56 (Utah 1982).

Where oral admissions of defendant in a criminal trial are introduced without an instruction that such evidence ought to be viewed with caution, there is no error as long as such an instruction has not been specifically requested, especially in a case where the subject matter is generally covered by the instructions that are given. State v. Shabata, 678 P.2d 785 (Utah 1984).

When faced with a claim that a particular assertion of instructional error not raised at trial should be considered on appeal because failure to do so would result in "manifest injustice" under Subdivision (c), the Supreme Court will determine whether to review such a claim of error under the same standard used to determine the presence of "plain error" under Utah Rule of Evidence 103(d). State v. Verde, 101 Utah Adv. Rep. 37 (1989).

—Review without objection.

Notwithstanding defendant's failure to object to jury instruction on criminal trespass, Supreme Court reviewed the instruction to prevent manifest injustice where the instruction misstated the law of criminal trespass and was entirely inconsistent with the statutory definition of that offense. State v. Lesley, 672 P.2d 79 (Utah 1983).

The Supreme Court declined to review a modified "dynamite" or Allen charge under the manifest error exception to Subdivision (c), where defense counsel did not remain silent but actively represented to the court that she had read the instruction and had no objection to it. State v. Medina, 738 P.2d 1021 (Utah (1987).

Where the defendant was not forewarned that the trial court was about to issue a verdict-urging instruction and had no opportunity to know of or object to the allegedly harmful portion of the instruction until after it was given to the jury, his failure to object to it prior to its being given to the jury did not bar consideration of the charge on appeal, under the manifest error exception in Subdivision (c). State v. Lactod, 761 P.2d 23 (Utah Ct. App. 1988).

Objections.

—Failure to object.

Defense counsel knew the contents of a proposed instruction from in-chambers discussion, knew that the instruction would be given orally, and made no objection to either the contents of the instruction or its oral presentation until after the verdict, but merely indicated that the instruction was not "appropriate." The defendant was, therefore, precluded from raising an objection on appeal. State v. Kotz, 758 P.2d 463 (Utah Ct. App. 1988).

—Specificity.

A general statement to the effect that an instruction does not correctly state the law is not a sufficient objection to the instruction for purposes of a later appeal. State v. Schoenfeld, 545 P.2d 193 (Utah 1976).

Subdivision (c) requires more than a general exception to the instructions. It requires that the matter excepted to and the ground therefor

where he was held sane on August 14, 1969 and trial was initially set for January 7, 1970 and commenced on April 8, 1970, after disposition of defendant's motion to dismiss made on January 7. State v. Carlsen, 25 Utah 2d 136, 478 P.2d 326 (1970).

Magistrate's authority to dismiss.

City court judge acting as a committing magistrate upon a preliminary examination did not have authority to dismiss criminal proceedings. Van Dam v. Morris, 571 P.2d 1325 (Utah 1977).

Offense improperly alleged.

In prosecution for rape of female under 18 years of age, where defendant was given preliminary examination on complaint charging rape had been committed on April 1, and information charged rape on that date, but proof showed that female was then over 18 years of age, and state promptly introduced evidence of prior acts of intercourse before female became 18, conviction could not be upheld since defendant was not given benefit of preliminary examination for offense for which he was convicted. State v. Hoben, 36 Utah 186, 102 P. 1000 (1909).

Reasonableness of delay.

Fact that information was not filed within 30 days after defendant's commitment, did not entitle defendant to discharge, where good cause for delay was shown. State v. Reynolds, 24 Utah 29, 66 P. 614 (1901).

Statutes not in conflict.

There was no conflict between statutes providing for dismissal of and bar to further prosecutions against a sole defendant for misdemeanors only and other statutes providing for dismissal of and bar to further prosecutions, whether felony or misdemeanor, against one of several joint defendants for purpose of allowing dismissed to be witness for the state. In re Petty, 18 Utah 2d 320, 422 P.2d 659 (1967).

Subsequent prosecution.

Where district court erroneously dismissed ordinance violation prosecution on appeal from city court but before arraignment and trial de novo in district court and that order of dismissal was later reversed by the Supreme Court, subsequent prosecution of defendant in district court for the ordinance violation was not "any other prosecution" within the bar of this section, it was merely the same prosecution which had never been begun de novo in the district court and thus was not barred. Boyer v. Larson, 20 Utah 2d 121, 433 P.2d 1015 (1967).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law §§ 512 to 519; 21A Am. Jur. 2d Criminal Law §§ 859 to 875.

C.J.S. — 22A C.J.S. Criminal Law § 468.

A.L.R. — Construction and effect of statute authorizing dismissal of criminal action upon settlement of civil liability growing out of act charged, 42 A.L.R.3d 315.

Propriety of court's dismissing indictment or prosecution because of failure of jury to agree after successive trials, 4 A.L.R.4th 1274.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 A.L.R.4th 1014.

Key Numbers. — Criminal Law ⇐ 574, 576.

Rule 26. Appeals.

(1) An appeal is taken by filing with the clerk of the court from which the appeal is taken a notice of appeal, stating the order or judgment appealed from, and by serving a copy of it on the adverse party or his attorney of record. Proof of service of the copy shall be filed with the court.

(2) An appeal may be taken by the defendant from:

(a) the final judgment of conviction, whether by verdict or plea;

(b) an order made, after judgment, affecting the substantial rights of the defendant;

(c) an interlocutory order when, upon petition for review, the appellate court decides that the appeal would be in the interest of justice; or

(d) any order of the court judging the defendant by reason of a mental disease or defect incompetent to proceed further in a pending prosecution.

(3) An appeal may be taken by the prosecution from:

(a) a final judgment of dismissal;

(b) an order arresting judgment;

(c) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;

(d) a judgment of the court holding a statute or any part of it invalid;

(e) an order of the court granting a pretrial motion to suppress evidence when, upon a petition for review, the appellate court decides that the appeal would be in the interest of justice; or

(f) an order of the court granting a motion to withdraw a plea of guilty or no contest.

(4) (a) All appeals in criminal cases shall be taken within 30 days after the entry of the judgment appealed from, or, if a motion for a new trial or arrest of judgment is made, within 30 days after notice of the denial of the motion is given to the defendant or his counsel. Proof of giving notice shall be filed with the court.

(b) An appeal may not be dismissed except for a material defect in taking it, or for failure to perfect the appeal, or upon motion of the appellant. The dismissal of the appeal affirms the judgment unless another appeal may be, and is, timely taken.

(5) Cases appealed in which the defendant is unable to post bond shall be given a preferred and expeditious setting in the appellate court.

(6) Appeals may be submitted on briefs. If an appellant's brief is filed, the appeal shall be decided even though a party, upon notice of the hearing, fails to appear for oral argument.

(7) The rules of civil procedure relating to appeals govern criminal appeals to the appellate court, except as otherwise provided.

(8) (a) In appeals to the Supreme Court of capital cases where the sentence of death has been imposed, appellant briefs shall be filed within 60 days of the filing of the record on appeal. Respondent briefs shall be filed within 60 days of receipt of the appellant brief. All issues to be raised on appeal shall be included by each party in its appellate brief. Appellant reply briefs shall be filed within 30 days of receipt of the respondent's brief.

(b) One 30-day extension of the 60-day filing period may be granted to each party, but only upon application to the Supreme Court showing extraordinary circumstances warranting an extension.

(c) The Supreme Court shall schedule the oral arguments of the case to be heard not more than ten days after the date of filing of the final brief. Following oral arguments, the case shall be placed first on the Supreme Court's calendar, for expeditious determination.

(9) After an initial appeal has been resolved, a subsequent appeal of a capital case where the sentence of death has been imposed may not be entertained by any court, nor may a stay of execution of the sentence be granted, when the appeal does not raise any new matter not previously resolved or when new matter could have been raised at the previous appeal.

(10) In capital cases where the sentence of death has been imposed and the defendant has chosen not to pursue his appeal, the case shall be automatically reviewed by the Supreme Court within 60 days after certification by the sentencing court of the entire record, unless the time is extended by the Supreme Court for good cause. A case involving the sentence of death has priority over all other cases in setting for hearing and in disposition by the Supreme Court.

(11) The rules of practice for the Court of Appeals and circuit courts made by the Judicial Council and approved by the Supreme Court relating to appeals from circuit courts govern criminal as well as civil appeals.

(12) An appeal may be taken to the Supreme Court or the Court of Appeals, as is appropriate, from all final orders and judgments rendered in a district court or juvenile court under this rule.

(13) An appeal may be taken to the circuit court from a judgment rendered in the justice court under this rule, except:

(a) the case shall be tried anew in the circuit court. The decision of the circuit court is final, except when the validity or constitutionality of a statute or ordinance is raised in the justice court;

(b) within 20 days after receipt of the notice of appeal, the justice court shall transmit to the circuit court a certified copy of the docket, the original pleadings, all notices, motions, and other papers filed in the case, and the notice and undertaking on appeal;

(c) stay of execution and relief pending appeal are under Rule 27, Utah Rules of Court Procedure; or

(d) all further proceedings are in the circuit court, including any process required to enforce judgment.

(77-35-26, enacted by L. 1980, ch. 14, § 1; L. 1983, ch. 51, § 1; 1987, ch. 237, § 1; 1989, ch. 65, § 3.)

Amendment Notes. — The 1983 amendment substituted "Rule 27" for "Rule 30" in Subsection (k)(3).

The 1987 amendment rewrote this section, which formerly read as amended by Laws 1983, ch. 51, § 1.

The 1989 amendment, effective April 24, 1989, added "whether by verdict or plea" to the end of Subsection (2)(a); deleted "or" from the end of Subsection (3)(d), added "or" to the end of Subsection (3)(e), and added Subsection (3)(f); substituted "may" for "can" in the second sentence of Subsection (4)(b); divided Subsections (6) and (13)(a) into two sentences by deleting "and"; divided Subsection (8) into Subsections (8)(a) through (8)(c); substituted "made" for "promulgated" in Subsection (11); added "Utah Rules of Court Procedure; or" to the end of Subsection (13)(c); and made minor stylistic changes throughout the rule.

Compiler's Notes. — This rule governs appeals from district, circuit, and juvenile courts. The practice and procedure for taking such appeals, including the time in which the appeal is filed, is prescribed by the Rules of the Utah Supreme Court and the Rules of the Utah Court of Appeals.

The reference in Subsection (13)(c) to the "Utah Rules of Court Procedure" is apparently intended as a reference to the Rules of Criminal Procedure.

Cross-References. — Appeals from circuit court to district court, § 78-4-11.

Appeals from justice's court to district court, § 78-5-14.

Appellate jurisdiction of district courts, Utah Const., Art. VIII, Sec. 5; § 78-3-4.

Appellate jurisdiction of Supreme Court, Utah Const., Art. VIII, Sec. 3; § 78-2-2.

Applicability of Rules of the Utah Supreme Court, Rule 1, R. Utah S. Ct.

Dismissal if affidavit of impecuniosity is untrue, § 21-7-7.

A Judicial Council, Utah Const., Art. VIII, Sec. 12.

Right of defendant to appeal, Utah Const., Art. I, Sec. 12; § 77-1-6.

Right of indigent accused to counsel on appeal, § 77-32-1 et seq.

cretion in refusing to allow a change of venue State v Smith, 11 Utah 2d 287, 358 P 2d 342 (1961)

A bare allegation of prejudice in the county is patently inadequate to justify a change of venue. State v Wood, 648 P 2d 71 (2d case) (Utah), cert denied, 459 U S 988, 103 S Ct 341, 74 L Ed 2d 383 (1982)

Defendant failed in his burden of proving that a fair and impartial trial could not be had in the county where the action was tried, and was therefore not entitled to a change of venue, where his motion for a change of venue was supported only by his counsel's affidavit to which was attached a single newspaper article reporting the victim's father's gratitude for the manner in which victim's family had been taken care of by local authorities, and which reported a short and accurate account of a few of the basic facts of crime, including the names of the two persons who had been charged, such supporting evidence was a mere allegation of prejudice in the county and was not adequate to justify a change of venue State v Wood, 648 P 2d 71 (2d case), cert denied, 459 U S 988, 103 S Ct 341, 74 L Ed 2d 383 (1982)

Motion for a change of venue and the documents supporting the motion failed to show that the community atmosphere was sufficiently inflammatory that the jurors' assurances of impartiality should have been disregarded, even though some of the jurors had expressed an opinion that defendant was guilty State v Lafferty, 749 P 2d 1239 (Utah 1988)

Defendant was not entitled to a change of venue where pretrial publicity and community sentiment was not so prejudicial as to lead inevitably to an unfair trial, to prevail on appeal, defendant must demonstrate that the trial was not fundamentally fair State v Bishop, 753 P 2d 439 (Utah 1988)

Factors to be considered in determining the potential for prejudice from pretrial publicity include (1) the standing of the victim and the accused in the community, (2) the size of the community, (3) the nature and gravity of the offense, and (4) the nature and extent of publicity State v James, 99 Utah Adv Rep 14 (1989)

Disqualification of judge.

A judge should recuse himself where there is a colorable claim of bias or prejudice, even under such circumstances, however, absent a showing of actual bias or an abuse of discretion, failure to recuse does not constitute reversible error as long as the requirements of this rule are met State v Neeley, 748 P 2d 1091 (Utah 1988)

A judge who has had previous contact with a defendant on a totally unrelated matter is not per se disqualified State v Neeley, 748 P 2d 1091 (Utah 1988)

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am Jur 2d Criminal Law § 372 et seq

C.J.S. — 22 C J S Criminal Law §§ 186 to 222.

A.L.R. — Pretrial publicity in criminal case as ground for change of venue, 33 A L R 3d 17

Change of venue by state in criminal case, 46 A L R 3d 295

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 A L R 4th 942

Disqualification of judge because of political association or relation to attorney in case, 65 A L R 4th 73

Key Numbers. — Criminal Law ⇐ 115 to 145

Rule 30. Errors and defects.

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order. (77-35-30, enacted by L. 1980, ch. 14, § 1)

Cross-References. — Arraignment, necessity of objection to preserve error, § 77-35-10

Indictments and informations, harmless errors, § 77-35-4

Gun control laws, validity and construction of, 28 A. L. R. 3d 845.

Law Reviews.

The Constitutional Right to Keep and Bear Arms, Lucilius A. Emery, 28 Harv. L. Rev. 473.

Restrictions on the Right To Bear Arms —State and Federal Firearms Legislation, 98 U. Pa. L. Rev. 905.

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Comparable Provision.

Montana Const., Art. III, § 27.

Cross-Reference.

Eminent domain generally, 78-34-1 et seq.

In general.

"Due process of law" comes to us from the Great Charter and is synonymous with "law of the land." It means that a party shall have his day in court—trial. Jensen v. Union Pac. Ry. Co., 6 U. 253, 21 P. 994, 4 L. R. A. 724.

Due process of law is not necessarily judicial process. People v. Hasbrouck, 11 U. 291, 39 P. 918.

Judgment against defendant, not served with process and not appearing either in person or by attorney, would not be due process of law. Blyth & Fargo Co. v. Swenson, 15 U. 345, 49 P. 1027.

It is elementary that there can be no judicial action affecting vested rights that is not based upon some process or notice whereby the interested parties are brought within the jurisdiction of the judicial tribunal about to render judgment. Parry v. Bonneville Irr. Dist., 71 U. 202, 263 P. 751.

"Due process of law" requires that, before one can be bound by a judgment affecting his property rights, some process must be served upon him which in some degree at least is calculated to give him notice. Naisbitt v. Herrick, 76 U. 575, 290 P. 950.

Due process of law requires that notice be given to the persons whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. Riggins v. District Court of Salt Lake County, 89 U. 183, 51 P. 2d 645.

The phrase "due process of law" apparently originated with Lord Coke, who defined the terms. Many attempts have been made to further define due process of law, but all of them resolve into the thought that a party shall have his day in court. Christiansen v. Harris, 109 U. 1, 163 P. 2d 314.

In depriving a person of life or liberty, the essentials of due process are: (a) the existence of a competent person, body, or agency authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made. In the absence of statute laying down other or more specific requirements, the above conditions meet the demands of due process. In the absence of specific provisions to the contrary, due process does not require that any or all of these requirements must be in writing or in any particular form. In the interests of orderly procedure and certainty as to its proceedings and action taken, any legally constituted body or agency should as far as practical have written records of all proceedings before it, except where otherwise provided by law. Christiansen v. Harris, 109 U. 1, 163 P. 2d 314.

In the trial of criminal cases the statutes prescribe certain rules of procedure, which must be substantially complied with to keep the proceedings within the due processes of the law. A somewhat different set of rules is prescribed in civil cases and in special proceedings. Some rules, affecting all types, are not found in the statutes, but in that great basic body of the law commonly known as the decisions or rules of the courts. But all these methods and means provided for the protection and enforcement of human rights have the same basic requirements—that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses. Christiansen v. Harris, 109 U. 1, 163 P. 2d 314.

While normally we think of "due process of law" as requiring judicial action, yet "due process" is not necessarily judicial action. Christiansen v. Harris, 109 U. 1, 163 P. 2d 314.

Land Registration Act.

The Torrens Act was not unconstitutional as conferring judicial powers on registrar of titles. Ashton-Jenkins Co. v. Bramel, 56 U. 587, 192 P. 375, 11 A. L. R. 752.

Limitation of actions.

This section does not preclude the legislature from prescribing a statute of limitations for time within which to assail the regularity or organization of an irrigation district. Horn v. Shaffer, 47 U. 55, 151 P. 555.

Occupational disease law.

Occupational Disease Disability Law, in excluding compensation for partial disability from silicosis, and in rendering remedy under that act exclusive so as to abrogate common-law right of action therefor, is not unconstitutional as depriving such employee of his remedy by due course of law for injury done to his person. Masich v. United States Smelting, Ref. & Min. Co., 113 U. 101, 191 P. 2d 612.

Waiver of rights.

Right to apply to courts for redress of wrong is substantial right, and will not be waived by contract except through unequivocal language. Bracken v. Dahle, 68 U. 486, 251 P. 16.

Workmen's compensation law.

Employers are entitled to have recourse to courts under Workmen's Compensation Act concerning question of their ultimate liability. Industrial Comm. v. Evans, 52 U. 394, 174 P. 825.

Workmen's Compensation Act is not invalid because it delegates to industrial commission the power to hear, consider and determine controversies between litigants as to ultimate liability, or their property rights. Utah Fuel Co. v. Industrial Comm., 57 U. 246, 194 P. 122.

Dependents of employee killed by acts of third party, a stranger to employment, are not limited to recovery under Workmen's Compensation Act exclusively, unless they have assigned their rights to insurance carrier. Robinson v. Union Pac. R. Co., 70 U. 441, 261 P. 9.

Collateral References.

Constitutional Law⇐322, 324, 327, 328.

16 C.J.S. Constitutional Law §§ 709, 711, 714, 719.

16 Am. Jur. 2d 718-721, Constitutional Law §§ 382-385.

Law Reviews.

The Doctrine of Forum Non Conveniens, Edward L. Barrett, Jr., 35 Calif. L. Rev. 380.

The Doctrine of Forum Non Conveniens in Anglo-American Law, Paxton Blair, 29 Colum. L. Rev. 1.

No-Fault Automobile Insurance in Utah —State Constitutional Issues, 1970 Utah L. Rev. 248.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Comparable Provision.

Montana Const., Art. III, § 16.

Cross-References.

Defendant as witness, 77-44-5.

Double jeopardy, statutory provision, 77-1-10.

—acquittal notwithstanding defect in information or indictment, 77-24-12.

—acquittal or dismissal without judgment, 77-24-11.

—acts punishable in different ways, punishment limited to one, 76-1-23.

Sec. 23. [Irrevocable franchises forbidden.]

No law shall be passed granting irrevocably any franchise, privilege or immunity.

Comparable Provision.

Montana Const., Art. III, § 11.

Alcoholic beverages.

Former Liquor Control Act held not unconstitutional as violative of this section. Utah Manufacturers' Assn. v. Stewart, 82 U. 198, 23 P. 2d 229.

State legislature was acting within its power in enacting Liquor Control Act, which in effect revoked previously granted license authorizing the sale of light beer. Riggins v. District Court of Salt Lake County, 89 U. 183, 51 P. 2d 645.

Pioneer Memorial Building.

Act pertaining to leasing of portion of state capitol grounds to Daughters of Utah Pioneers for erection and maintenance of Pioneer Memorial Building, and amendments thereto making appropriations therefor, as well as appropriation of $150,000 for that building, were not violative of this section. Thomas v. Daughters of Utah Pioneers, 114 U. 108, 197 P. 2d 477, appeal dismissed for want of a properly presented substantial federal question, 336 U. S. 930, 93 L. Ed. 1090, 69 S. Ct. 739.

Collateral References.

Franchises⇐11.

37 C.J.S. Franchises § 26.

36 Am. Jur. 2d 733-745, Franchises §§ 9-23.

Competition by grantor of nonexclusive franchise, or provision therefor, as violation of constitutional rights of franchise holder, 114 A. L. R. 192.

Inclusion of different franchise rights or purposes in same ordinance, 127 A. L. R. 1049.

Sec. 24. [Uniform operation of laws.]

All laws of a general nature shall have uniform operation.

Cross-Reference.

Prohibition on private or special laws, Const., Art. VI, § 26.

In general.

All laws shall operate uniformly wherever uniform laws can be enacted. State v. Holtgreve, 58 U. 563, 200 P. 894, 26 A. L. R. 696.

Objects and purposes of law present touchstone for determining proper and improper classifications. State v. Mason, 94 U. 501, 78 P. 2d 920, 117 A. L. R. 330; State v. J. B. & R. E. Walker, Inc., 100 U. 523, 116 P. 2d 766.

One who assails legislative classification as arbitrary has burden of proving it to be such. State v. J. B. & R. E. Walker, Inc., 100 U. 523, 116 P. 2d 766.

Classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for differentiation between classes or subject matters included, as compared to those excluded, provided differentiation bears reasonable relation to purposes of act. State v. J. B. & R. E. Walker, Inc., 100 U. 523, 116 P. 2d 766.

Before legislative enactment can be interfered with, court must be able to say that there is no fair reason for the law that would not require equally its extension to those which it leaves untouched. State v. J. B. & R. E. Walker, Inc., 100 U. 523, 116 P. 2d 766.

Only where some persons or transactions excluded from operation of law are, as to the subject matter of the law, in no differentiable class from those included in its operation, is the law discriminatory in the sense of being arbitrary and unconstitutional, and if reasonable basis to differentiate can be found, law must be held constitutional. State v. J. B. & R. E. Walker, Inc., 100 U. 523, 116 P. 2d 766.

Inability of legislature to make perfect classification does not render statute unconstitutional. State v. J. B. & R. E. Walker, Inc., 100 U. 523, 116 P. 2d 766.

In determining whether classification made by legislature is unconstitutional, discrimination is very essence of classification and is not objectionable unless founded upon unreasonable distinctions. Gronlund v. Salt Lake City, 113 U. 284, 194 P. 2d 464.

An act is never unconstitutional because of discrimination as long as there is some reasonable basis for differentiation between classes which is related to the purposes to be accomplished by the act, and it applies uniformly to all persons within the class. Hansen v. Public Employees' Retirement System Board of Administration, 122 U. 44, 246 P. 2d 591.

practice law and the conduct and discipline of persons admitted to practice law.

Repeals and Reenactments. — See the Compiler's Note following the analysis at the beginning of this article Former Article VIII contains no comparable provisions.

Cross-References. — Supreme Court rule-making process, Rule 11-101, Code of Judicial Administration.

Cited in Stewart v Coffman, 748 P.2d 579 (Utah Ct. App 1988).

DECISIONS UNDER FORMER PROVISIONS

ANALYSIS

Judge pro tempore
Regulation of practice of law.

Judge pro tempore.

Appointment of a judge pro tempore to hear and decide a divorce action does not violate the provisions of § 30-3-4, since a properly appointed pro tempore judge becomes the equal in every respect to the regular judge Harward v Harward, 526 P 2d 1183 (Utah 1974).

Circuit judge appointed by state court administrator to serve temporarily as a district judge pursuant to § 78-3-24 and former § 78-4-15 was not a judge pro tempore and was not subject to the legal restrictions pertaining to that status. Cahoon v Cahoon, 641 P 2d 140 (Utah 1982)

Regulation of practice of law.

Inherent in the judicial power conferred on the Supreme Court by former Article VIII, sec 1, of the Utah Constitution is the power to regulate the practice of law In re Utah State Bar Petition, 647 P 2d 991 (Utah 1982).

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

Repeals and Reenactments. — See the Compiler's Note following the analysis at the beginning of this article See former Art VIII, Secs 7, 8 and 9 in the bound volume for the former provisions comparable to this section

ANALYSIS

Summary appellate disposition.
Cited

Summary appellate disposition.

Summary affirmance under Rule 10, Ct. App. R., is a determination of the appeal on its merits, after a full and adequate opportunity has been afforded all parties to present their arguments, and does not deny an appellant his right of appeal Hernandez v Hayward, 764 P 2d 993 (Utah Ct App 1988)

Cited in Heninger v Ninth Circuit Court, 739 P 2d 1108 (Utah (1987), DeBry v Salt Lake County Bd of Appeals, 764 P 2d 627 (Utah Ct App 1988)

A.L.R. — Place where claim or cause of action "arose" under state venue statute, 53 A.L R.4th 1104

DECISIONS UNDER FORMER PROVISIONS

ANALYSIS

Appeal to Supreme Court by the state in criminal cases.
Appeal to Supreme Court where case originated in circuit court.
Appeal to Supreme Court where case originated in justice or city court.
Defendant's right to appeal
Divorce decree

AMENDMENTS
TO THE
CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TABLE OF AUTHORITIES

CASES CITED

CERTIFICATE OF DELIVERY

I, Roger K. Scowcroft, do hereby certify that I mailed a copy of the foregoing to the South Valley County Attorney's Office, 2001 South State Street, Suite S3700, Salt Lake City, Utah 84190-1200 this _____ day of January, 1990.

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